UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP) and 08-01420(JMP)(SIPA)

Adv. Case Nos. 09-01241, 09-01261, 09-01242, 09-01120, 09-01130.

- -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

LEHMAN BROTHERS SPECIAL FINANCING INC.,

Plaintiff,

-against-

HARRIER FINANCE LTD.,

Defendant.

- -x

(cont'd. on next page)

- -x
LEHMAN BROTHERS SPECIAL FINANCING INC. and
LEHMAN BROTHERS HOLDINGS, INC.,
Plaintiff,
-against-
AMERICAN FAMILY LIFE ASSURANCE COMPANY OF
COLUMBUS, et al.,
Defendants.
- -x
LEHMAN BROTHERS SPECIAL FINANCING INC.,
Plaintiff,
-against-
BNY CORPORATED TRUSTEE SERVICES LIMITED,
Defendant.
- -x
WONG, et al.,
Plaintiffs,
-against-
LEHMAN BROTHERS SPECIAL FINANCING INC.,
Defendants.
- -x
(cont'd. on next page)

- -x

OLIVIA BAM,

Plaintiff,

-against-

BARCLAYS CAPITAL INC.,

Defendant.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

July 15, 2009

10:03 a.m.

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

OMNIBUS HEARING

HEARING re Debtors' Motion for Authorization and Approval of Settlement Agreement with Kojaian Affiliates [Docket No. 4160]

HEARING re Motion of Kalaimoku-Kuhio Development Corp. for an Order Compelling Payment of Post-Petition Rent and Charges and Relief from the Automatic Stay [Docket No. 3768]

HEARING re Motion of DnB Nor Bank ASA for Allowance and Payment of Administrative Expense Claim and Allowing Setoff of Such Claim [Docket No. 4054]

HEARING re Motion of Levine Leichtman Capital Partners Deep Value Fund, L.P. for an Order Compelling Debtors' Performance [Docket No. 4059]

HEARING re Motion of Official Committee of Unsecured Creditors to Direct the Examiner to Comply with Court's Order Directing Appointment of an Examiner [Docket No. 4262]

HEARING re Debtors' Motion Requesting Second Extension of Exclusive Periods for the Filing of and Solicitation of Acceptances for Chapter 11 Plans [Docket No. 4253]

RE: ADV. CASE NO. 09-01241:
HEARING re Pre-Trial Conference/Motion Granting Authority to Intervene as Plaintiff

RE: ADV. CASE NO. 09-01261:
Pre-Trial Conference

RE: ADV. CASE NO. 09-01242:
Pre-Trial Conference/Motions to Intervene

RE: ADV. CASE NO. 09-01120:
HEARING re Pre-Trial Conference/Motion to Stay Discovery

RE: ADV. CASE NO. 09-01130:
HEARING re Motion to Dismiss Adversary Proceeding

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P R O C E E D I N G S

THE COURT: Please be seated.

MR. H. MILLER: Good morning, Your Honor. Harvey Miller, Weil Gotshal & Manges on behalf of the debtors. Today is an auspicious date, Your Honor. It's exactly ten months ago today that we all began this epic journey into the demise of Lehman and where it is going. I'm sure as Your Honor will recall the first four of the five months was the period of a series of emergencies as the debtors strived to preserve and protect the assets of these estates. By my count, Your Honor, I think this is the eighteenth omnibus hearing and we have today one uncontested matter, five contested matters, five adversary proceedings and a combination of fourteen adjourned adversary proceedings and contested matters. And with Your Honor's permission, Mr. Waisman will lead off on the agenda.

THE COURT: That's fine. Thank you.

MR. H. MILLER: Thank you.

MR. WAISMAN: Good morning, Your Honor. Shai Waisman, Weil Gotshal Manges on behalf of Lehman Brothers Holdings, Inc., debtors. As Mr. Miller mentioned, the first matter on the agenda this morning, the revised agenda, which was filed early this morning on the Court's docket, is the debtors' motion for authorization and approval of a settlement agreement with the Kojaian Affiliates.

Your Honor, the original motion was filed at docket

4160. Objections were due July 10th. No objections were received. In essence, Your Honor, this was a joint venture project between the debtors and Kojaian and certain affiliates in the Detroit, Michigan area. The result here of several disputes is essentially an amicable divorce with each of the parties walking away with certain properties, certain payments and releases. As I indicated, Your Honor, no objections were filed. I'm happy to answer any questions Your Honor may have.

I do note that since the filing of the motion and the proposed order, the order was modified. Just to clarify for one of the original parties, JPMorgan, here that certain language in the order didn't affect a release of any of their interests. So I do have a blackline and clean order to hand up to the Court.

THE COURT: Why don't you approach with that and I'll take a look at the blackline. Thank you.

(Pause)

THE COURT: Looks fine. Does anybody wish to be heard on this?

MR. COLEMAN: Ken Coleman, Your Honor, on behalf of the Kojaian Affiliates. I just wanted to confirm that wording just to make sure that that was the wording that our clients had agreed on for the change in the order. Because -- just one moment, Your Honor.

THE COURT: Take a look.

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank, Tweed, Hadley & McCloy on behalf of the committee just weighing in as we have in the past with respect to these complex real estate settlements. We have looked at this closely. We have looked at what the debtors are keeping, what they're giving up and the releases they're getting. And based on a review, we're satisfied that it's a transaction that makes sense for the estate in its current form.

THE COURT: That comforting, thank you.

MR. COLEMAN: Your Honor, thank you for the time. That language is acceptable to us.

THE COURT: Fine. It's approved.

MR. WAISMAN: With that, Your Honor, we move onto the contested portion of the LBHI agenda. First matter on the contested calendar is the motion of -- and I'll try it again, Kalilocho-Kohunio (sic) --

THE COURT: I don't think you did it right that time, either.

MR. WAISMAN: Certainly wrong again. And I believe the movant is here.

MR. NEALE: Good morning, Your Honor, David Neale, Leven, Neale, Bender, Rankin & Brill on behalf of Kalaimoku-Kuhio Development.

Your Honor, we're back from our hearing on June 24th and unfortunately not a lot has happened to change the status

quo.

THE COURT: Well, I think a lot has happened, but maybe we're back to a place similar to where we were last time.

MR. NEALE: I think that's right, Your Honor. There was a sale motion that was filed. It was subsequently adjourned to August 5th. We learned from the buyer yesterday that the sale agreement had been terminated. We had learned prior to that that the deposit that was required under the sale agreement by the end of June had not been made. So we're here today, essentially, in the same place we were. Except now, another month's worth of rent has come due. So at this point the post-petition default amount is up to 800,000 dollars. It's, obviously, going to increase August 1st. We've heard from the debtor that they're evaluating options, that they're considering alternatives and so on and so forth. But as we discussed last time, Your Honor, the concern my client has is that you can consider alternatives indefinitely and my client has now become the largest involuntary lender to this debtor having extended over 800,000 dollars worth of post-petition credit.

At this point, Your Honor, as we discussed last time, Section 365(b)(3) stated in a mandatory that the debtor shall timely perform its obligations. Mr. Waisman conceded that point in his declaration in support of the motion for an order shortening time or an order to show cause why the hearing on

the sale motion cannot be accelerated and conceded that the obligations are about a million two as of July 14th or cure about 850,000 of that is post-petition. At this point, Your Honor, my understanding is that the debtor has adjourned the sale here until August 5th. I would anticipate that they're going to get up before Your Honor and say, let us have another crack at this and let us have until August 5th to try to figure this out. At the last hearing, Your Honor was pretty clear about saying that either come back with an agreement with the landlord about the payment to post-petition rent or explain to me how it is you're going to pay this post-petition rent. Well, there's no motion to approve DIP financing, there's been no advance by any of the other debtors to this estate. There's no payment that's been made. When we were last here, there was about 150,000 dollars of cash in the bank. I don't even think there's that anymore. If there is, that's all there is. So again, my client's in a position of standing before Your Honor having requested relief which is still on hold even though 365(b)(3) requires the debtor perform by sixty-days into the case.

So again, we just ask that the Court, at this point, grant our motion. If the debtor has a transaction that it wants to propose to us after the motion has been granted, we're open to considering all issues. But at this point, the post-petition rent really should be paid.

THE COURT: Okay. We'll let me find out --

MR. O'DONNELL: Thank you, Your Honor.

THE COURT: -- the debtors' positions on this.

MR. WAISMAN: Your Honor, as --

THE COURT: Did he predict what you were going to say?

MR. WAISMAN: I think there's a little bit more to that and that's certainly not our request as to their request to put this out to --

THE COURT: Someone who is on the phone should mute the phone. In fact, everybody who's on the phone should mute the phone. We heard you in the courtroom. Mr. Waisman, please proceed.

MR. WAISMAN: Their request to put off to August is not accurate. Last we were before Your Honor we did have a asset purchase agreement signed by a purchaser. We executed it immediately after the hearing. The purchaser was required to provide a deposit. The purchaser asked for more time. And for the benefit of the estate and all of its stakeholders we provided more time. The hearing for Monday was put off to today and on Monday we received the supplement that the landlord's attorneys filed indicating in quite some detail the wherewithal, alleged wherewithal, of the purchaser to consummate the deal. That isn't information that we provided and subsequent to receiving this supplement that was filed in the docket, the purchaser in fact sent over a notice of

termination which we received late yesterday afternoon. This is not an enviable situation, but the debtor is striving to do the best by its estate and all stakeholders. There are other parties that have expressed an interest. We would like to quickly circle back with them. See if there's somebody who's willing to step into the shoes of this purchaser and quickly consummate a deal. Otherwise I agree; we really have no alternative but presumably to reject the lease.

In terms of the landlord position as an administrative creditor, either we will come forward with a purchaser which will satisfy their claims, and hopefully all claims of administrative creditors in the Kalakaua estate or will be left with a number of administrative creditors, including the landlord but not exclusively the landlord, and it certainly would be inappropriate, from the estate's perspective, to prefer the landlord over the other administrative creditors. And at that point, we could determine what the next steps would be, what the assets of the estate are and how to proceed with its most valuable asset, which is the building.

THE COURT: Isn't that the only asset really?

MR. WAISMAN: There are other contracts. There is a tenant in place that has, I believe there is some --

THE COURT: But this is single asset real estate in all -- for all practical purposes, correct?

MR. WAISMAN: I think that's accurate.

THE COURT: One of the concerns I have here, Mr. Waisman, is to this case and it's a mundane case that's caught up in an extraordinary bankruptcy. It's a case with limited liquidity accruing administrative claims, a landlord aggressively pressing the motion for payment and it's the sort of situation which if it weren't arising in a packed courtroom might lead to somebody filing a motion to dismiss, even the debtor, or some Hail Mary pass towards financing our sale, which is what we seem to be doing. And I'm frankly a little concerned about the potential -- administrative insolvency in this case, raising some serious questions for this morning. Is there any plan to fund from sources outside this debtor for payments that are due and owing to the landlord?

MR. WAISMAN: Other than locating a purchaser to take on the liabilities, no, there is not.

THE COURT: I'm inclined to grant the landlord's motion unless there is something more than a general representation of interest in the property. Because last time we adjourned this to today, with the understanding which proved to be true, that there was a real fish on the hook; well, that fish got away. And just because there may be some other fish out there, may not be a sufficient reason to defer this. I'd like to hear if there is some substantive reason to think that putting this over to August 5 would lead to a different outcome.

MR. WAISMAN: Your Honor, the debtors have had since about 4 yesterday afternoon to react to the notice of termination. It's not as though the debtors knew that the purchaser was walking away last week and have been evaluating their options since then and contacting other interested parties. I think it would be in the estate's best interest if the debtors had a minimal amount of time to see if this purchaser has any remaining interest or is truly walking away. There hasn't even been an opportunity to call the purchaser. And for us and the broker to turn back to the other parties that have contacted us up until last week because this did receive local press, to see if there's a transaction. And debtor is not looking to delay this into eternity. We agree there should be a finite deadline on when we have to make our determination, but I think it's reasonable. We've had no time to react to the termination of the asset purchase agreement or to see if there's another transaction that would benefit the estate. Understanding the landlord is going to take every advantage of this termination in an attempt to not only demand rent payments but to seek a blanket carte blanche modification of estate to pursue remedies that aren't even specified. We can address that when and if the time is right, but I think the debtor should be afforded a brief window here to react, review its alternatives, speak to the landlord, speak to the purchaser and determine how to proceed with the case.

MR. NEALE: Your Honor, may I respond?

THE COURT: Sure.

MR. NEALE: Your Honor, the purchaser failed to make the deposit in late June. It's now the middle of July. There's certainly been an opportunity to discuss the situation with the purchaser. In addition, we had understood from the debtor and the purchaser that there were discussions that were ongoing between the debtor and the purchaser between the time that the deposit was not made and today's hearing. In fact, the hearing on Monday was adjourned so that there could be contemplation of additional overbids to the extent that the debtor was talking to other parties and wanted to see if there were other opportunities out there.

Essentially, the debtor is asking for more time as every debtor would ask for more time if he could live in bankruptcy rent free. That's basically what the debtor is suggesting here. That we take another month to have the debtor consider its options and evaluate its alternatives. That's exactly what we heard last time we were here; a roundup of a signed purchase agreement. That purchase fell apart. They've had the opportunity to explore these alternatives. They've had the opportunity to solicit overbids. At this point, by August, my client's claim will be a million five. They have a purchase agreement of three million dollars that has now fallen apart. Presumably, the next bid is going to be even lower than that.

THE COURT: Well, I wouldn't want to say that in an open courtroom.

MR. NEALE: Your Honor, we would love to see it be for as much as possible, but we haven't seen any bids be made on this property.

THE COURT: Presumably the market will be whatever the market is for an asset of this sort, but I wouldn't presume that it's going down.

MR. NEALE: Your Honor, it will be what it will be if it will be.

THE COURT: It will be what it will be.

MR. NEALE: If it will be. That's really the question here, Your Honor. The plea for more time was basically the same plea the debtor made last time we were here. If the Court is inclined to give more time, which hopefully it is not because of the mandatory language of 365(b)(3) that, at a minimum, the debtor be required immediately to pay the amounts due. The Court last time inquired, "Are there other entities that are going to advance funds to this entity so that the rent can be paid?" The answer then was the same answer as you received today. No it is not.

THE COURT: I'll tell you what I'm inclined to do and I'm sympathetic both to the position being expressed by the landlord and also to the debtors' plight.

I'm prepared to grant your motion in part and to put a

time trigger on it. In fact, a delayed fuse. And it's August 1. I'm going to order that the debtor in this case pay the rent which is due pursuant to the lease by August 1. Failing that, you can have stay relief. That, in effect, gives the debtor the fifteen day window to either come up with financing if it wishes to in effect play the optionality of holding onto the property for sale or lose rights under applicable Hawaiian state law.

MR. NEALE: Thank you, Your Honor. We'll prepare an order and submit it to the Court.

THE COURT: That's fine.

MR. NEALE: Thank you.

MR. WAISMAN: Thank you, Your Honor. Item 3 on the agenda this morning is the matter of DnB NOR Bank. It's DnB's motion. For the debtors my colleague, John Lucas will be arguing.

THE COURT: Okay.

MR. LUCAS: Good morning, Your Honor. John Lucas, Weil Gotshal for the debtors. I believe Mr. Shore will be arguing for DnB.

MR. SHORE: Good morning, Your Honor.

THE COURT: Good morning.

MR. SHORE: Chris Shore from White & Case for DnB NOR Bank. Let me start with two apologies. First, this is a relatively small matter in a packed courtroom. Having heard

what Your Honor said yesterday about preparing for the hearing, I had asked to take it off but the debtors wanted to move forward today.

My second apology is, once again, I seem to have found an issue as to which there isn't a whole lot of case law on. I think some of it, some of the presentation, is basic principles but there is an issue at the end as to which I don't think there are any cases or any writing on, so it may take a little more time to deal with that esoteric issue. I presume the Court's familiar with the underlying facts of the deposits and the various deposits.

THE COURT: I'm very familiar with this dispute.

MR. SHORE: Okay. The issue today is with respect to the ninety-nine million dollar kroner deposit account which was in -- which is a pre-petition debt which was offset against the pre-petition debt. Whether after the offset there's an additional adequate protection payment that is due for the diminution in the value of that collateral between the petition date and the date of November 5th when adequate protection was provided in the form of allowing DnB NOR to convert the currency into U.S. Dollars.

THE COURT: My recollection is that your partner, Mr. Uzzi, was present in court when this issue first came up. And my best recollection, and the transcript will speak for itself on this, is that there was a right to convert kroner to dollars

with the debtors' consent that I believed to be prospective as of that point. Now, is there an open issue of fact as to whether or not it was intended to be prospective or not or is that something that your client concedes?

MR. SHORE: My client concedes that any currency fluctuation after November 5th was on its own account. That is, it waited for an opportune moment to convert that currency and converted the currency and as discussed with the Court on December 3rd, which is the first hearing I came in on, we made that clear at that point as well, but did say that there was an open issue -- going to be an open issue to be resolved with respect to what happened in the period from the petition date to November 5th and that reservation of rights was memorialized in the stipulation and order which Your Honor signed which dealt with two issues; the evidentiary presentation on the smaller kroner account and the authorization for the actual offset of the ninety-nine million dollars.

So the basic facts, I don't think, are in dispute here. From the petition date to -- well, on the petition date, there was ninety-nine million kroner on deposit. Two days after the filing, DnB NOR sent a letter to the debtors saying we want -- we want to offset this. We want to offset it now subject to a reservation of rights. We want to avoid issues of fluctuation and said "If you can't do that, we'll file a motion for lifting stay or in the alternative to seek adequate

protection." The debtors didn't respond. No problem there; obviously they're busy. But on September 30th that motion was filed.

THE COURT: Obviously are busy, it was September of 2008.

MR. SHORE: No question, no question. I just -- the point being is that the debtors were given the choice two days into the case to exercise their right to either lift the stay --

THE COURT: You have to be kidding in making this argument. At September 17th the case is two days old. We're talking about the day before the procedures hearing in the Barclays sale. The financial markets worldwide are reacting in panic and you're suggesting -- are you actually suggesting this, that there's an adequate protection right because you sent a letter?

MR. SHORE: There is -- the Best Products case which is set forth, Judge Lifland sets out very clearly, and it's actually been written upon by a number of people in the courtroom, the problem of when to start accruing the adequate protection payment. I don't think there's a dispute here that adequate protection is due. There are numerous cases out there, coming out of chambers --

THE COURT: This is a dispute what adequate protection is to.

MR. SHORE: Well --

THE COURT: I read the committee's papers which suggest you don't even have a claim.

MR. SHORE: Let me -- let me revise that or state that more clearly. The -- a secured creditor is entitled to adequate protection for the diminution of its collateral while the stay is pending. The question that comes up in the cases is when does the right of payment accrue and how do you calculate that? And there is a split as to whether it just runs from the petition date until the time the stay is lifted and the issue that arises and the concern that people have raised, including Judge Lifland, is that a secured creditor would gain the system. That they wait until confirmation and at that point raise the issue of the diminution and the collateral and seek to throw additional administrative claims on the estate at an inopportune moment. What Judge Lifland said was, "No, the right to accrue the obligation to pay the adequate protection comes when the debtor is given the choice." And in that case the debtor was given the choice with the filing of the motion.

So technically, if one is focusing on that choice argument, it is two days into the case. I'm not faulting the debtors for not responding but that's when the right to payment starts accruing.

THE COURT: Well, there are two dates in September.

One is September 17th when you send a letter; the other is September 30 when you file a motion.

MR. SHORE: Right.

THE COURT: Are you saying that your sending of a letter is a trigger event for purposes of your adequate protection claim?

MR. SHORE: Yes.

THE COURT: And is your adequate protection claim purely based upon foreign currency exchange risk?

MR. SHORE: Yes.

THE COURT: Okay.

MR. SHORE: And the reason I make the distinction is there is about -- and we have some differences in calculation; there is about a two or three hundred thousand dollar swing between the period of the sending of the letter and the filing of the motion. But the issue that the debtors raise and that the committee raise -- well, first of all, the debtors raise an issue that the committee doesn't raise, which is that the -- we have no right to adequate protection on the motion filing date because it was an alternative request. That is, we said, "Lift the stay or provide adequate protection". I don't think that's a proper reading of Best Products. Best Products is if you give them a choice, they have to then choose. The debtors did not consent on September 30th to allow the offset and it was later determined that DnB NOR had a right of offset at that

time. DnB warned them of the currency fluctuations and offered to offset subject to reversal at a later date. I don't think there was ever any question as to whether DnB NOR was creditworthy enough to deal with the issue if it was determined that it was a post-petition -- if it was a post-petition deposit which was the potential issue at that point. Remember, we separated out the seven million kroner from --

THE COURT: I remember and I decided in a memoranda decision which I'm sure you've read.

MR. SHORE: We've read and we appreciate it. It is a now a final order so everything that's in there is law of the case in connection with this motion as well. And we certainly appreciate the debtors need to investigate. And they said they needed to investigate and we're not faulting the professionals. But the debtors bore the risk of loss between the time that they were given the option and the time that they gave us the right to offset. And fundamentally, that's the issue. Who bears the risk of loss of the value of the collateral between the time that the request is made and the time that the relief is granted? And if you want to look at it from a big picture item, the code is full of sections which make clear the congressional intent that a secured creditor is, to the fullest extent possible, not to be affected by the bankruptcy.

THE COURT: Is there any law, because I'm just not familiar with it, that equates adequate protection and foreign

currency exchange risk?

MR. SHORE: No. I've not seen any cases, and it came up in the context of dealing with the other motion as well, that deal with what happens to the value of the collateral. There are cases out there where commodities, where you can see the fluctuation more clearly than you can with, for example, a non residential real estate parcel.

THE COURT: I have a hard time; I'm just giving you my state of mind on this, equating foreign currency exchange risk, which is inherent in banking, which is what your client does, with diminution in value of collateral. In effect, if you have a collateral account that includes dollars or yen or sterling, whatever it may be, that's the collateral. It's worth what it's worth in the market. And unless you're involved in currency swap arrangements, it's inherent in the collateral you're holding. I'm, frankly, perturbed by something that nobody has really raised which is the entitlement as a matter of law to adequate protection with respect to currency that a bank holds.

MR. SHORE: The problem --

THE COURT: It's own deposit accounts.

MR. SHORE: -- right. The problem we have, and we wouldn't have a problem if we could denominate our claim in kroner, but the code won't allow us to denominate the claim in kroner. So you can have a very liquid asset which has market

prices published all the time, gold, but you still have to convert it into U.S. dollars. It can be converted quickly, it can be converted almost instantaneously, but it has to be converted. And that's the problem you have. The code is what's causing the problem because it requires --

THE COURT: I'm not sure I agree with that. Because in international transactions routinely, daily, every hour, every minute, parties deal with this risk all the time with currency swaps. That's what they do.

MR. SHORE: But there is --

THE COURT: Or they assume the risk.

MR. SHORE: Well, that's the issue. The question is who assumes the risk in this instance, right? Do you put the risk on the secured creditor who can't do anything because the stay is in effect, or do you put it on the debtor who could consent to lifting the stay? At that point, the bank has an open position in kroner and doesn't know whether it's going to --- is a position that it can't hedge because it doesn't know whether at the end of the day it's going to be handed ninety-nine million kroner or it's going to be handed in adequate protection payment. The debtor is the one, once the choice is put to it, that can control whether or not it's going to consent to allow the stay to be lifted or it's going to enforce the stay and take on an adequate protection obligation with respect to currency risk.

So I agree the question is allocation of risk, I just think that the code, which is built around protecting the secured creditors from risk, is going to put that onus on the debtors.

Now, this is going to be an odd case, obviously, because you're not going to have a situation normally where you've got a large amount of currency, which we have here, such that it makes it worth litigating, you had a material devaluation in currency over a short period of time, and you had a secured creditor who is then out in front of it saying we want to do this. We want access to this account now and we want you to lift the stay to do that.

So that's, I think at the end of the day, an allocating risk; it's not creating an adverse precedent, at least in the currency fund or otherwise, that says that the burden is on the debtor or the risk is on the debtor of the devaluation of the collateral, whether it's gold, currency, real property, during that period in which it's deliberating over the choice that's been put to it. Either give the secured creditor the collateral or keep it and maintain your adequate protection obligations.

Once we get past that, that there is a right to adequate protection, we get to what I think the committee's response is, which is, you may have a right to adequate protection, but you're not entitled to any priority for it.

And that's the 507(b) argument and where we could really get caught in the weeds for a while.

I think that, first of all, they've overlooked one fact. We still have the seven million kroner account, which is a -- now Your Honor has ruled a post-petition obligation. To the extent that there is an obligation to pay adequate protection for the currency devaluation, it is a secured claim to the amount of that deposit. And I don't think anybody could really argue that. We've now determined it's a post-petition obligation to pay adequate protection if there is one and a post-petition deposit obligation. So of the two and a half million sought, about a million would be a secured claim.

The difficult issue is in 507(b) and just what Congress was doing there. 507(b) covers a failure of adequate protection. What happens when adequate protection, which was given, is not enough to compensate the secured creditor for the loss, and that's another instance in which Congress has evinced it's intent, driven largely by constitutional concerns, that the secured creditor to the fullest extent possible not be harmed by the imposition of -- in specifically 362. And I think the argument that the committee's making is focusing on the language in 507(b) which says that "Such creditor", and it may be worth pulling out here -- 507(b) gives a second priority ahead of all other second priority claims to an adequate -- for adequate protection to the extent, quote, "Such creditor has a

claim allowable under subsection (a)(2) of this section arising from the stay of an action against such property under Section 362." And (a)(2) is a 503(b) claim.

503(b), the provision which would be applicable, is the actual necessary costs of administering the estate. And the argument that the committee is making is that although we might have a claim for adequate protection, they're not conceding that, but if to the extent we have a claim for adequate protection, it's just not entitled a priority; it's part of your pre-petition deficiency claim and it's actually duplicative of the pre-petition deficiency claim. Because the deposit account, that ninety-nine million dollars did not benefit the estate. And I think -- I think that's the argument that they're making.

Now, they don't cite any authority. There are no cases. We've looked. There's just nothing out there which deals with the issue of where a secured creditor has an adequate protection claim but can't demonstrate actual necessary -- the actual necessary expense obligation for 503(b) that there's no priority to it. But I do have a couple of responses to that.

First of all, we have cited to the cases that say that where the debtor has enforced the stay, which they did here, that it is presumed that the property that they were not giving over was benefitting the estate. Now, I recognize they're

foreign cases but there is authority on our side that says that it's just presumed, the debtor would not be fighting the automatic stay unless it was bent to keep the property unless the property was benefitting the estate. And here, the debtor elected to hold the cash while it was doing its investigation, as it says, but that's a cost of doing business. But I think where it gets really difficult, is I think this just raises that whole Reading issue of what happens with respect to a post-petition act of the debtors?

The adequate protection payment is a post-petition obligation of the debtors. The debtors are essentially saying even though as a post-petition obligation, you can't show that we benefitted you at all. That is DnB provided any benefit to the estate, any more than the people who were injured in Reading by the fire; they didn't benefit the estate, but the Supreme Court came out very clearly and said, no. The privilege of operating in Chapter 11 requires that your post-petition obligation be paid as administrative expenses. They are benefitting the estate.

And so you've got this statute, 507(b), which requires a secured creditor to show actual use for an adequate protection payment, but the Supreme Court saying that it's presumed. If it's a post-petition obligation, it is actual and necessary. But I think you can harmonize it by going back to these demand cases.

If you've got -- there is an obligation to pay adequate protection for the diminution and the value of the collateral, but the obligation for the debtor to pay that, does not arise until the demand is made, until they're given the choice. At that point, the debtor is using the code to prevent -- electing to use the code to prevent the secured creditor from taking the collateral. And in the instance in which they are electing to do that, that is the benefit to the estate. It may be at the end of the day that all the benefit was that they got to exercise their fiduciary duties and determine whether or not we were a legitimate creditor and whether it is a pre-petition or post-petition claim, but that's the post-petition benefit. They cited -- the only case that even comes close to that is the Enron case, that gas capacity pipeline, but that's a totally different issue. That's a, first of all, an unsecured creditor, but it's also a pre-petition obligation. We talked a little bit yesterday about the DESCO and that weird GAAP period, that's what that case is. Which is somebody on a pre-petition contract coming forward with arguing that even though it's a pre-petition contract, it's got a post-petition obligation.

The obligation to pay adequate protection which accrues at the time that the demand is made is a post-petition obligation that is entitled to the second priority. So once you get past there is an adequate protection, of the claim, and

this is what we -- a million dollars of that is secured, we've asked for the authorization to offset and there's no objection to the offset to the extent that there is an obligation to pay adequate protection. So a million of that would be subject to offset and the remainder, whether calculated from the petition date, the date of the letter going out, or the date of the motion, is entitled to a second priority. And if you don't have any questions, I'll sit down and hear what the others have to say.

THE COURT: Let's hear what everybody else has to say about this.

MR. LUCAS: Your Honor, John Lucas, Weil Gotshal for the debtors. Your Honor, we believe that the case law is clear here and that when the bank filed its setoff motion that moved the Court for stay relief to setoff its claim against the funds. And LBHI initially opposed the motion because the bank failed to carry its burden, as it must, to show that it was setting off pre-petition claims against pre-petition claims between DnB and LBHI and it failed to do that and that's why we opposed it.

And notably, Your Honor, the bank's motion expressly stated that as an alternative that it sought adequate protection and only if the Court denied its request for stay relief and that never occurred, Your Honor. Nevertheless, at the November 5th hearing, LBHI agreed that the bank convert the

funds in the account to kroner to U.S. dollars. The bank, nonetheless, failed to timely convert the funds. And, Your Honor, it was only after we complained at the December 3rd hearing that DnB agreed that it would take the risk from November 5th forward. We don't believe that was its intention until it didn't exercise its rights that were provided at the November 5th hearing.

By the bank's current motion, it now asks the Court to provide it with this super priority administrative expense claim pursuant to Section 507(b) as a result of currency fluctuations from the petition date through November 5th, even though the bank never made a request to this Court for adequate protection for this period, and the bank expressly conditioned any request upon the Court modifying the automatic stay.

Your Honor, the bank is essentially asking the Court to provide it with adequate protection with respect to a period of time that proceeds the date any request was made. The law is clear in this circuit and others that a secured creditor is not entitled to adequate protection until the request is made, and in this case, the bank cannot reformulate and change the relief it actually requested in its setoff motion. And we think that the Best Products decision supports this result.

In addition, Your Honor, the motion fails for other reasons. As the committee also pointed out in its objection, in order to be entitled to a super priority administrative

expense claim, you must satisfy three elements. You must show that you are granted out of protection and that ultimately failed. That the creditor has an allowable admin claim under 503(b)(1). And that such claims arose as a result of, in this case, Section 362. The bank cannot satisfy these elements.

First, it's unclear how the bank can say that the right to convert the funds was inadequate. When it was given such right, it failed to do so and it didn't so until a month a half later. The bank made knowledge of this December 3rd hearing, which we've already discussed.

Second, this Court has not granted, and the bank has not demonstrated that it's entitled to an admin claim under 503(b). The bank fails in this regard because it cannot point to any consideration that it provided to LBHI that actually benefitted the estate. As we know, that administrative expense claims were provided to prevent the estate from being unjust and rigid -- unjustly enriched at the expense of the secured creditor.

As this Court held in the Enron decision that's cited in the debtors' objection, "An entitlement to an administrative expense claim cannot be sustained on the purported loss on the creditor but only on the actual benefit of the estate."

And the bank here, as it's relying on the three foreign cases that it cites in its motion, in those cases each of the debtors entered into adequate protection agreements with

a secured creditor and it was required to make adequate protection payments. And in each of those situations, the debtor was in possession and was able to use the equipment that actually provided a concrete benefit to the estate. Here, that didn't occur. The funds were not used by LBHI because the bank immediately froze the funds after the petitions were filed in LBHI's case. LBHI never sought to use the funds, it didn't seek the bank's consent and it did not file the motion pursuant to 363(c)(2) to seek Your Honor's authorization to use the funds. The funds remain there today and we've never had access to them although Mr. Shore said earlier on -- in our argument that we had possession of them while we were deliberating and figuring out which was pre- and which was post-; that's not the case.

Any delay associated with the bank setoff motion was caused by the bank's plan to satisfy its burden under Section 553. Once the banks applied this information, LBHI promptly agreed to consent to the setoff. Your Honor, in the end, the bank is not entitled to a super priority administrative expense claim, because the adequate protec -- if it had the adequate protection, it was more than sufficient and it cannot demonstrate that it has an administrative expense claim under 503(b).

And one other point to respond to a point that you brought up, Your Honor, is that -- about whether or not a

creditor is entitled for adequate protection for the foreign currency that it holds.

The debtors are the ones that had a claim against DnB in foreign currency, because the deposit, the account, is in Norwegian kroner and they owe us the money. However, DnB's claim is in U.S. dollars with respect to a separate credit agreement. And so we agree with Your Honor when Your Honor says that they're not entitled to adequate protection, the money in the account is what it's worth. And unless Your Honor has any further questions, we believe that the motion should be denied.

THE COURT: Okay. Thank you.

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank Tweed Hadley and McCloy on behalf of the committee. I don't think -- I can be very brief here, Your Honor, because I think Mr. Lucas covered his both own arguments and ours very well and I think you've read our papers. Just two points to sum it up.

Number one, in terms of whether adequate protection was properly requested here, we don't think it was and the right to not accrue is a result. They had the opportunity to do so on a number of occasions. They contend that a letter did it but post -- subsequent to the letter, they had other opportunities to crystallize that request and that request was not properly made.

And secondly, we think the dispositive point is that

as to the use of the cash, it was never used. It say there and the administrative freeze was never -- the debtors never sought to undue the administrative freeze, so there was no use of the credit cash and there could be no detriment to the estate or any use for which the debtors had to compensate the creditor here. Unless the Court has any further questions, that's all we have to say.

THE COURT: I don't have any other questions. Mr. Shore, do you have anything more?

MR. SHORE: Just three quick points. First, the focus here has to be on, seems to me if they're going to rely on Best Products, when were they given a choice? They were given the choice. It was not lift the stay to some extended period in the future or pay in the adequate protection, it was I want the money now subject to any kind of demand at a later date. So the demand -- they're trying to convert the demand for the payment of the money and to pay me sometime in the future and if you -- or give it to me some time in the future and if you don't give it to me at some time in the future, pay me adequate protection now. The demand was give me the money now. That's -- that was the demand so if you're not going to give me the money now, give me the adequate protection now.

Second, there was a suggestion there that it was our delay in establishing the right, the payment, or right to offset. The first information -- the first request we got for

information from Lehman was in the week prior to the November 5th hearing. So this was not an instance in which the motion was filed, the debtor came to us immediately and said, oh, we've got serious questions with respect to this or that. The delay there was in the debtors' requesting information. Ultimately, the motion was correct with respect to the ninety-nine million. The allegations that DnB NOR made with respect to it being an offsettable amount were correct. So again, on the risk there, the bank couldn't have done anything more than make a valid application and respond to the debtors' request, which it did.

With respect to the benefit, I just don't hear the debtors' dealing with Reading or its progeny. If it's a post-petition obligation, it's presumed to be actual and necessary. You cannot take the position that I burned the building down and I injured other people but those injuries that other people suffered didn't benefit the estate. It's presumed to benefit the estate. If they incurred an obligation to pay adequate protection, it's presumed that it's actual and necessary. It's not the burden of the party to show that the debtor got a benefit because otherwise that takes 507(b) out. There isn't a situation which is going to be a failure of adequate protection unless the debtor did something, unless the collateral was devalued. So I think that to try to turn 507(b) into every secured creditor needs to come forward and show actual benefit,

I think misreads the statute.

MR. LUCAS: May I, Your Honor?

THE COURT: Sure, briefly.

MR. LUCAS: There are no presumptions under 503 of the bankruptcy code. You have to prove the benefit. It's not assumed on account of the creditor's loss. And here, Your Honor, there's no buildings burned or anything, it's money that sits in the account that DnB is controlling and has been holding and frozen from LBHI's access since the petition date.

THE COURT: Okay. Well, this is a fairly esoteric argument before a packed courtroom of people who may or may not be interested in it. I'm going to reserve judgment on this. In part because I want to give some more thought to the question that I raised but that others really didn't raise in their papers which is whether there is an entitlement to adequate protection in respect of currency exchange risk. And I'm going to invite the parties to submit letter briefs in reference to that issue. I bring this issue to everybody's attention in part because it occurred to me and I think it's a real issue. I don't know to what extent in the global cases involving Lehman Brothers there may be others similar kinds of claims that could be made or whether or not the DnB NOR example is purely a one-off situation. But I would like to know what the parties think of that question and believe that it makes some sense for counsel for the committee, the debtor and DnB

NOR to meet and confer about a schedule that makes sense for submitting those letter briefs. Mr. Lucas?

MR. LUCAS: And since this is the committee's -- I'm sorry, the bank's motion, we presume that the bank will submit its brief first and the debtors will respond.

THE COURT: I'm making no presumption about anything. I just would like the parties to meet at some point; can be on the telephone and just work out some sort of rational timetable for submitting very brief presentations on this subject. I don't think it needs to be elaborate. And I'll decide after I receive those presentations whether I'm simply going to provide a bench ruling or whether or not I'll issue a rather short additional memoranda decision relating to this dispute. And we'll work out a timetable for that with counsel.

I believe that for holding purposes, we should probably relist this for, perhaps, the September 23rd hearing date.

MR. LUCAS: Your Honor, I believe the hearing in September, I believe, is September 16th or at least for omnibus purposes.

THE COURT: Okay. Then it's September 16th.

MR. LUCAS: So we will make that annotation on the next agenda or file a notice with the bank.

THE COURT: Okay. Fine.

MR. LUCAS: Thank you, Your Honor. The next matter on

the agenda is the Levine Leichtman motion. And my colleague, Richard Levine, will be handling that from Weil Gotshal. Movant's counsel is here.

THE COURT: Mr. Miller, good morning.

MR. B. MILLER: Good morning, Your Honor. Brett Miller, Morrison Foster on behalf of Levine Leichtman Capital Partners Deep Value Fund LP. We're here on a motion compelling the debtors' performance on their open trades order or on the alternative, compelling payment as an administrative expense.

The facts, as set forth in the pleadings, are not in dispute. In the commercial paper is in breach of an assumed trade confirmation with my client. Unfortunately, Lehman Brothers, Inc. is holding the securities which need to be transferred to my client to complete the trade. June 15th was the deadline for performance under the agreement. That time period has passed. There have been numerous discussions back and forth between the parties, primarily between my firm and Weil Gotshal. We have not had direct conversations with Lehman Brothers, Inc. because we don't have any privity with them. The burden is essentially on Lehman Commercial to get the securities from Lehman Brothers, Inc. and they have not been forthcoming.

We thought we had a deal prior to filing a motion. It was supposed to be a three-way conference call set up; it was cancelled. We've not heard anything since from the Lehman

Brothers, Inc. side and we were left with no alternative but to file the motion seeking to compel the debtors to go to Lehman Brothers, Inc. to get the securities that are owed to my client or as an alternative for my client to go into the open market to purchase the securities at issue which are thinly traded as is noted in the pleadings.

THE COURT: Do you have any notion whatsoever as to what the securities are worth?

MR. B. MILLER: Essentially, they arguably have no value. It's a tagalong of post-confirmation bank debt trade where securities were thrown in. They're thinly traded. It's just my client feels that they're there --

THE COURT: So these are hope certificates?

MR. B. MILLER: Yes.

THE COURT: So we're fighting over hope certificates?

MR. B. MILLER: I think the basis is that we're fighting over something that is due to us, that has clearly within reach and at this point we need the SIPA trustee to just turn them over. They're holding them as a conduit. They've acknowledged that. They need to be turned over to Lehman Commercial to be turned over to my client so that Lehman Commercial is not in breach of the agreement.

THE COURT: I understand. Now, is LBI here and represented with respect to this issue? I didn't see any papers filed by LBI. LBI has been mentioned repeatedly in the

papers.

MR. LEE: Yes, Your Honor. Ken Lee, Hughes Hubbard for the SIPA Trustee. We're not a party to this particular lawsuit and no relief was sought against us so we did not file papers but I'm happy to address the Court's question.

THE COURT: Can you turn over these securities? That makes this whole thing go away.

MR. LEE: It would, Your Honor. Under SIPA, if they were customer named securities we would be able to do that. We're not, however, talking about customer named securities. They're not in the name of LCPI or Levine Leichtman. They're in the name of LBI. Therefore, they are arguably part of the fund of customer property against which the debtor has filed a proof of claim. And therefore, there is a claim's process where the claim has to be determined and at the end of that process, if it's an allowable claim, they would receive their pro rata share based on net equity. So, but if --

THE COURT: I understand your position, although there's something extraordinarily inefficient about a process in which not only do we have a packed courtroom of people who are billing time listening to this, but we have lawyers who have spent time and effort writing papers, an individual person who's sitting on the bench, that's me, who has spent time reading these papers. Mr. Miller confirms what I did not know, which is, these are securities of perhaps inconsequential value

or they may be of some value in the future but they're virtually impossible to value. And so we're spending real time and real money fighting over something that's purely theoretical. Am I right?

MR. LEE: Your Honor, to -- yes, you are right and to that end, that is why when we were approached by the debtor some time ago to see if we could work out an agreement so that we wouldn't all be sitting here filing papers, we have endeavored to engage in conversations. And I believe that there were discussions relating to the fact that there would be an acknowledgement and a stipulation on all sides that there was no real value to the securities and that pursuant to that we might be able to work out an accommodation. And the SIPA trustee is still interested if the other parties are interested in trying to work that out. But my understanding is that on the last go around, we were not able to reach an agreement on all sides so that we could accommodate the request --

THE COURT: What's the sticking point?

MR. LEE: -- in a manner consistent with the statute.

THE COURT: What's the sticking point?

MR. LEE: I believe that we were trying to enter into a stipulation about the fact that the securities had no value and my understanding was that that was not something that could be stipulated to by LCPI. But if I'm wrong then we can continue this discussion out of court.

THE COURT: Well, if it's a discussion that can take place in a conference room instead of a courtroom, that's probably an advantage. Let me hear from LCPI's counsel.

MR. LEVINE: Thank you, Your Honor. Richard Levine from Weil Gotshal. I think in terms of the actual motion, I mean obviously it's really frustrating, these securities just kind of caught up in a technicality and it's obviously frustrating to everyone that they just can't be turned over and just dealt with and move on, particularly when they are of virtually no value, so the possibility of it ultimately being held back by the trustee seems unlikely. But I think in terms from the prospective of the movant, they have shown no injury or even likelihood of injury from delay. These are not securities that are actively traded. They have not suggested they're going to go out there and try to sell them in the short term. In fact, they probably couldn't. There's no distributions coming in on them that they're losing out on.

THE COURT: Yeah, but they're part of a debt trade.

MR. LEVINE: I understand, but there's no injury to them by waiting a little longer while the SIPA process was --

THE COURT: Well, I suppose the injury is that they have -- they paid for something and they didn't get everything that they paid for.

MR. LEVINE: I understand. But it's still the intent of the debtors to satisfy the trade. To complete, obviously, a

significant portion of the consideration that was supposed to be transferred was transferred and it's only these as Your Honor has deemed them "hope securities" which are held out. And a further delay of a month, two months, three months, is not going to cause them any injury. It's not like these securities have any real value in the short term where ultimately it is going to cause any damage to them. Whether they got them on June 15th, which they should have, but because of the realities of the situation, the impracticability because of the SIPA proceeding they didn't get, and that waiting until August or September, there's no harm to them for the wait. Is it something that they were legally entitled to? Absolutely. Is there a reason why this Court should order anything which negatively impacts the estate as a result of that? I think the answer is, no. Obviously, what everyone hopes is that a three-way agreement can be reached and this can be resolved in the near term. But other than that, I don't see any reason why the movant should get any particular relief here at the moment.

Obviously, at the end of the day if there is an issue, if the SIPA trustee will not turn these certificates over, then we're at a different place. And then there is real damage. Now, how you measure that damage is questionable because these things are hope certificates. But at this point, there's no damage and no injury.

THE COURT: I'll hear Mr. Miller.

MR. B. MILLER: Your Honor, it was a month or two months and an agreement would be in sight it would be one thing, but I would ask the SIPA trustee's counsel, I mean he just asked explained it has to go through the entire proceeding; are we talking many months, are we talking years to possibly figure this out? And what if it takes seven months, eight months, ten months and these things do become valuable? Then my client will be the one who's harmed because if they got it today when it doesn't have any value, it's fine with the parties. But if in ten months the securities take off and I feel that something happens, then we're harmed. And then we're back in before Your Honor with an administrative claim seeking damages when it can all be remedied today by compelling the debtor here to enter into the stipulation which was proposed which is to turn over the securities because they have no value. It was just admitted on the record, essentially, by Lehman Commercial.

THE COURT: Now, are these securities directly related to the underlying borrower Plastech?

MR. LEVINE: Yes.

THE COURT: And is Plastech a public or private company at this point?

MR. LEVINE: I believe, yes, I believe it liquidated in Delaware. Chapter 11. It was a bank debt trade that --

THE COURT: It was a bank debt trade but what's the

underly -- who's the underlying obligor at this point? Is it Plastech? I'm trying to figure out what this is all about. Why are we here fighting about something that may have no value and that may be a waste of our time, collectively?

MR. LEVINE: It is my understanding, Your Honor, that as part of the bankruptcy, a portion of the debt was converted into equity, securities and a new entity.

THE COURT: In a new entity?

MR. LEVINE: Yes.

THE COURT: A new entity unrelated to Plastech or a successor to Plastech?

MR. LEVINE: It is my understanding it is a successor to Plastech.

THE COURT: And is that entity currently engaged in business?

MR. LEVINE: I don't know about that, Your Honor.

THE COURT: And is it a public company or a private company?

MR. LEVINE: I don't know that either, Your Honor.

MR. B. MILLER: I don't believe it is a public company because I was advised by my client these are thinly traded and it would be --

THE COURT: Thinly traded means that they are only traded privately by parties who decide after getting cards, okay, I'll satisfy my obligation by giving you these

certificates that may be worthless?

MR. B. MILLER: Correct.

THE COURT: Okay. That's the market?

MR. LEVINE: These are securities issued by someone called JCIM, of which as I understand is a successor entity to the original debtor.

THE COURT: Okay.

MR. LEVINE: And so the -- a portion of the original debt was paid off and a portion of it was converted into equity into this new entity and obviously the hope is that some day it will have value.

THE COURT: I'm sure. Maybe it will have value some day and I make no comment one way or the other as to what the value of these securities may be today or in the future, but I think that this is an extraordinary waste of resources. I'm shocked actually that everybody has spent this much time and effort at a highly sophisticated level dealing with something that is notionally of uncertain to inconsequential value. Something's wrong here.

That's not to say that a party to a debt trade is not entitled to the completion of that trade in accordance with its terms and there was, as I understand it here, a date by which the consideration was supposed to have been transferred and it didn't happen. And that's a real problem.

MR. LEVINE: That's true, Your Honor.

THE COURT: And if we were talking about something that involved significant measurable value, it would be a much bigger problem. So I think that there's a principle underlying this that should be respected.

I'm going to defer the entry of any lawyer for thirty days, but I'm inclined to grant the motion. During the next thirty-day period, recognizing that people in the summertime have vacations, I'm going to direct that a responsible party on behalf of the trustee and representatives of the debtor and the moving party meet and confer and resolve this. This is just lunacy. There has to be a placeholder that somebody can put in place for the securities to be transferred. There can be an indemnity claim over as against somebody's ability to prove the value of this. This is not intended to affect the rights of parties who are looking at the SIPA proceeding. This is an inconsequential piece of paper we're talking about that doesn't have measurable present value. And I'm not going to direct the trustee to do something the trustee does not believe to be appropriate in the administration of the LBI liquidation. But positions have to be taken that make sense. And this position simply makes no sense. The securities should be turned over and there should be an ability to reach an agreement to do something that simple. Transactional lawyers do this all the time and this is maybe something that a couple of transactional lawyers can figure out how to solve. Debt trades including

carried securities take place routinely and this one should close routinely and not take up any more Court time.

I'll consider this again at the September 16th omnibus hearing and hopefully it will be off calendar because it has been resolved by then.

MR. LEVINE: Thank you, Your Honor.

MR. B. MILLER: Thank you, Your Honor.

MR. DUNNE: Good morning, Your Honor. I think the next agenda item is ours. For the record, Dennis Dunne of Milbank Tweed Hadley McCloy on behalf of the Official Creditors Committee. The committee moved on July 1st for an order directing the examiner to comply with the limits of the mandate as set out in Your Honor's January 16th order. We received two objections to that motion. One from the examiner, which I submit helps telescope the issues and which we will address first. The second objection was filed by the Walt Disney Company as I submit is of an entirely different character and I will address some of their invective and digressions into other matters at the end of my remarks.

But by way of background, at the June 24th omnibus hearing, a colloquy occurred on the record between myself and Mr. Byman, counsel for the examiner, in connection with the Rule 2004 motion seeking discovery of Barclays. The examiner took the position that they were investigating every aspect of the sale transaction. I pointed out that the enabling order

expressly excluded claims relating to the transfer of assets from LBI or LBHI. Now, that was done on the ground not that they should not be investigated, but that that ground was already sufficiently covered because you had the SIPA trustee doing a report on precisely the transfer of those assets out of the LBI estate to Barclays as well as the debtor and the committee investigating potential causes of action.

After that colloquy, Your Honor invited us to tee up this motion sooner rather than later so that we could get clarification if there was a continuing disagreement over it. And --

THE COURT: I'd like to be clear on something. I didn't invite you to file a motion. I invited the parties to resolve any disagreements that might exist concerning scope.

MR. DUNNE: And failing that, we had to come back in front of Your Honor on this point. And it's really in that spirit, Your Honor. We're just seeking Your Honor's guidance on this. We can read the order. We've had discussions with the examiner. And let me just telescope it because I think it boils down to a relatively small item.

The -- in our discussions with the examiner, he has said that they don't intend to formally report on items that were carved out. And I believe they were drawing a distinction between investigation and formally reporting on, and so that they could investigate all aspects of the Barclays' transaction

but they wouldn't formally report on it. And if that's as far as went, we probably wouldn't be here in front of Your Honor today, but they continued by saying, well, if they found things that might signify claims or otherwise be noteworthy, they're going to include that in the report, whether that's formally reporting on them or not. And that may be what Your Honor intended. It may not be. I don't -- the committee doesn't believe it's what the order said and if you read it that broadly it swallows the exception. The committee's interpretation of the order is that Your Honor carefully heard and weighed all the various concerns. And given the fact that you had the SIPA trustee, the debtors and the committee already investigating this there was no reason for the fourth party, the examiner, to plow the same ground.

There's another item that the examiner comes up with and you'll hear about shortly, is the difference between direct claims and derivative claims. And I'll say at the outset that this kind of made my head spin a little bit. Because the way the committee views it is giving the enabling order, the examiner should see were there or were there not any assets transferred from an LBHI affiliate other than LBI. If yes, continue the investigation and see whether there were colorable claims arising therefrom. If not, duty discharged, mandate complied with, SIPA report will deal with the balance. And again, if we had agreement on that, we wouldn't be here today.

What the examiner says in response is, but there might be a derivative claim. And by that the examiner means let's assume that one of the LBHI affiliates has an intercompany claim against LBI. That intercompany claim might be worth less if LBI improperly transferred assets to Barclays. And so they can piggyback on that intercompany claim and investigate the entire propriety of the LBI asset sale transferred to Barclays. We, again, believe that that swallows the parenthetic where we expressly carved out the assets transferred from LBI. And so we would ask Your Honor to enforce the order as drafted, or give direction to expand it.

At the end of the day, it was Your Honor that -- we're seeking Your Honor's guidance on this, but I think it helps all the parties to just be clear about it at this point while we still have months and months before we actually see the report from the examiner.

Which brings me to the Walt Disney Company's objection and I'll be brief here, because I think a lot of this stems from the fact that they were not in court on June 24th, unaware of the context of the motion, but let me try and I'll just try dispassionately to address some of their comments.

They suggest that we're motivated by some anti-transparency concerns to hide findings of the examiner. That couldn't be farther from the truth. We're -- we have three parties already investigating it. Every aspect of that

transaction will be investigated and made public either through the SIPA report or in some type of litigation. As you'll see in the next motion, Your Honor, in exclusivity, the committee was very concerned about transparency and settled out their concerns about an extended exclusivity request by compelling the debtors to make more disclosures four months from now in connection with the second half of that extension.

And taken to a logical extreme, the Walt Disney Company's argument is that even in the face of what we think is pretty clear language in the order, if there is some -- there's a floating transparency goal that allows you to flout an order of the court if you think it furthers transparency. We don't buy that. We think that Your Honor waived the balance of transparency, duplication of effort and costs in setting the language as it did. They also cast dispersions on the committee and implied that we must be near or in settlement discussions with Barclays that would somehow favor LBHI and we don't want that to see the light of day and therefore there should be another committee. That again, makes my head spin. It's baseless, it's spurious; if they want to make a motion for another committee, actually I think you have to go back to the U.S. Trustee again, but if they wanted avail themselves of those rights, they're free to do that. That's not before Your Honor today.

I can go on and address the others. I will not at

this point, Your Honor. I will cede my time for any rebuttal if anybody continues to raise these issues. Of course, if Your Honor has any questions, I'll address them. Otherwise I'll sit down.

THE COURT: Okay. Thank you. Well, let me hear from the examiner.

MR. BYMAN: Good morning, Your Honor. Robert Byman on behalf of the examiner. I hope it is clear to Your Honor that we have no interest in doing anything that you didn't ask us to do, nor do we have any interest in not doing things that you did ask us to do. So if we've gotten Your Honor's order wrong this is a good time to tell us, and we will happily comply.

Unfortunately, we did not have the discussions that Mr. Dunne alluded to before this motion was filed. This motion might have looked a little different had we done that. The discussions came afterwards. And we didn't have the discussions with Mr. Dunne. I, personally, spoke with Mr. Fleck and with Mr. O'Donnell, and I think maybe something got lost in the translation. And Mr. O'Donnell may have his own recollection of what we said, but my recollection is that we assured the creditors' committee that we are not looking into any possible claims by LBI or LBHI. We understand that those are carved out. We are, however, looking into claims that affiliates of LBI might have as a result of the sale. And that comes directly from the bullet point at page 4 of the

examiner that directs the examiner to look into whether consequences to any LBI affiliate, as a result of the consummation of the transaction, created colorable causes of action that inured to the benefit of the creditors of such subsidiary or affiliate.

In order to do that, Your Honor, we have to understand pretty much everything about the transaction. We can't do it in the vacuum of saying this looks fair or not fair without understanding the transaction. And that's all I told Mr. O'Donnell we were doing. I also told him, I assured him, that we were not planning to make gratuitous comments about findings of fact that did not apply to any of the conclusions we are going to draw. I don't recall, frankly, if I mentioned 1106 to him, but we're mindful of 1106, which requires that if we stumble across something in the course of our investigation that suggests incompetence or malfeasance or fraud on behalf of somebody that leads to a cause of action we're required to comment on it.

So we will comment on things that we think Your Honor has asked us to do. We will comments on things that the Bankruptcy Code requires us to do. And we will go no further. Does Your Honor have any questions of us?

THE COURT: I actually don't. I read your written response, and I'm hearing your oral presentation. I don't think there's a problem here, based upon what I understand to

be your interpretation of your mandate, because your interpretation is consistent with my understanding of what you would be doing in order to fulfill the objectives of the order. I believe that it was Walt Disney Company that used the metaphor that we're really dealing with two sides of the same coin. It's impossible, really, to understand what may have been transferred in respect of affiliates without understanding the transaction itself.

Now, that having been said, it's also true that I think I have been fairly consistent in my comments regarding the avoidance of unnecessary duplication of effort, and it was really in that spirit that I suggested that there be a meet and confer session in connection with the examiner's work protocol, which I understand took place, and I understand that people are mostly not getting in each other's way. I suppose that, consistent with some other papers that I've seen from Mr. Bienenstock, that there may be some concerns about the overall efficiency of the case at this point. But that's not before me right now. It will be soon.

As it relates to the motion of the creditors' committee, and I can hear from Mr. Bienenstock on this as well, but I probably don't need to. I've very comfortable, based upon what I've read from counsel for the examiner, that what the examiner is doing is appropriate and fully consistent with what I expected the examiner should be doing.

If there's some particular example, however, of parties getting in each other's way to the point that there is a potential for conflict or inconsistent outcomes, or the potential for diminishing the value of any identified causes of action because things are stated publicly that turn out to be inconsistent with conclusions reached by others who are conducted an examination on their own that may overlap with the examination being conducted by the examiner, I can understand that potential concern. But that's not before me today.

MR. BYMAN: Thank you, Your Honor. And I probably should have said what I know you have surmised, that we are working to make sure that we eliminate duplication every step of the way.

THE COURT: I expected you to say that, and I'm sure that's true.

MR. BYMAN: I should have said it on my own until you prompted me. Thank you.

THE COURT: Mr. Bienenstock, I've sort of given you a cue not to speak, but if you wish to say something you're welcome to.

MR. BIENENSTOCK: I'll take the cue, Your Honor.

THE COURT: Fine. That works for me. So the motion of the committee is appreciated but denied.

MR. MILLER: Your Honor, Harvey Miller on behalf of the debtors, once again, Your Honor. The debtors have moved,

Your Honor, pursuant to Section 1121(d), for a second extension of the exclusivity periods. I will attempt to be brief, Your Honor. Pursuant to Section 1121(d) of the Bankruptcy Code extensions of the exclusivity periods may be granted for cause.

The debtors have requested that the exclusive period for the filing of Chapter 11 plans be extended for a period of eight months. The official creditors' committee, as per its statement filed on July 14th, 2009, supports the debtors' motions as set forth in that statement based upon the agreement of the debtors to provide additional reports and updates to the creditors' committee. The Bank of New York Mellon Trust, as indenture trustee, filed an objection to the debtors' motion that the extension be less than that requested by the debtors. I am advised by the attorney that the attorneys for the Bank of New York Mellon Trust are present in Court today and will inform the Court that the objection is withdrawn on the same basis as set forth in the official committee's statement.

As a result, Your Honor, there is only one objection to the debtors' motion. An objection was filed on or about July 10, 2009 on behalf of what has been self-characterized as an ad hoc group of Lehman Brothers creditors, comprised of Elliott Management Corporation, King Street Capital Management, L.P. and Paulson & Co. Inc. who, together with their affiliates, allege to hold claims against the debtors, including directly against Lehman Brothers Holdings Inc.,

totaling approximately 13 billion dollars. Although the so-called group refers to itself under that characterization, the debtors submit that the group is nothing more than an ad hoc committee of hedge funds that may have purchased distressed obligations of one or more of the Lehman debtors.

In the debtors' reply to the objection the group is referred to as the hedge fund committee. That committee's objection, Your Honor, is the only objection, as I said, to the requested extensions. The hedge fund committee concedes that at issue is the control of the administration of these Chapter 11 cases. It contends one, that the administration of the Chapter 11 cases lack transparency. Two, a confirmable plan can be filed despite the dearth of critical information as to the debtors and their estates that a hypothetical investor would need to make an informed judgment to accept or reject a proposed plan. And, three, the integrity of Mr. Marsal, the CEO of Lehman Brothers Holdings Inc. Alvarez & Marsal is the financial advisors, and the incumbent boards of directors of the debtors must be questioned. Allegedly, they are only concerned with extending the administration of these Chapter 11 cases so that they may continue to earn large and unjustified fees.

The contention of this committee, Your Honor, the contentions are totally without substance or merit. The hedge fund committee asked the Court to accept its ipse dixit that it

knows better than anybody else as to what should be done in the administration of these debtors' cases. The hedge fund committee misconstrues the provisions of the Bankruptcy Code and refers to a single comment from a Second Circuit decision in In re Grayson-Robinson Stores, Inc. as signifying the decisional principle applicable to the debtors' motion.

I hate to say it, Your Honor, but the Grayson-Robinson case was the third case in my career that I ever argued in a District Court, and I am thoroughly familiar with the case. That case involved an issue as to whether the Bankruptcy Act in effect in those days required a company with public debt to use the processes in Chapter 10 reorganizations versus Chapter 11. And what was ultimately decided in that case, Your Honor, is there was no mandatory requirement to use Chapter 10, and what was the decisional principle was the needs to be served by the particular debtor. The statement that Mr. Bienenstock refers to, Your Honor, was pure dicta. And I think I happen to have written that statement at the time in my brief.

In addition, Your Honor, it completely ignores the Second Circuit's recent decision in Smart World Technologies, which said that Congress determined, in connection with Chapter 11, that the control, in effect, the control of the administration of the estate is placed in the debtor and the debtor in possession.

We believe, Your Honor, that cause has been

established in connection with this motion and as we have set forth in the omnibus reply to the objection, Your Honor, at pages 2, 3 and 4. Undisputed facts.

A) The Chapter 11 cases of the debtors constitute the largest and most complex Chapter 11 cases in the history of the United States.

B) The financial collapse of the Lehman enterprise resulted in consequences to the financial markets and the global economy which have not yet been fully determined.

C) The Lehman enterprise was a global business. The commencement of these Chapter 11 cases and the onset of administration proceedings under the insolvency laws of the United Kingdom for Lehman Brothers Inc. (Europe), otherwise known as LBIE, resulted in a complete breakdown in the financial reporting systems of the Lehman enterprise which has caused substantial difficulties in recreating the financial transactions involving the Lehman entities.

D) Since the commencement date there have been over eighty foreign insolvency proceedings initiated involving segments or units of the Lehman Enterprise.

E) A protocol among the receivers and other fiduciaries appointed in the major foreign insolvency proceedings and the Chapter 11 debtors was formally approved by the Court on June 17, 2009. The major foreign insolvency proceeding, the U.K. administration proceedings involving LBIE,

remains outside of the approved protocol and the ability to freely access and receive information from LBIE administrators continues to be problematic.

F) The full extent of the respective assets and liabilities of the debtors, including potential causes of action and claims that may be asserted on behalf of each debtor, is still not yet determined.

G) The status, extent and allowability of the intercompany claims as between LBHI, its debtor affiliates and the non-debtor Lehman entities, have not yet been determined.

H) On September 16, 2008, the United States Trustee appointed a statutory committee of unsecured creditors. The official committee is represented by professionals, including two forensic advisory firms. They have closely monitored the administration of these Chapter 11 cases. The official committee has consented to the extension of the exclusive periods as set forth in its statement, dated July 14, 2009.

I) A multitude of investigations are being pursued as to the acts, conduct and affairs of the debtors and their affiliates, including those being pursued by the official committee, The United States Attorneys for the Southern and Eastern Districts of New York and the District of New Jersey, and state enforcement agencies.

J) At the request of the Walt Disney Company, represented by the co-attorneys for the hedge fund committee,

and with the consent of the debtors, on January 16, 2009 Anton Valukas, Esq., the Managing Partner of the law firm of Jenner & Block, was appointed as examiner in these Chapter 11 cases under an extremely broad charter to add to the transparency of the administration of these cases. The examiner originally contemplated that his investigation would be completed within nine months from the date of appointment, based upon his estimation of the scope of discovery and analysis that would be required. More recently the examiner has indicated that additional time would be required, inasmuch as the volume of documents that need to be produced and examined exceeded his estimation by almost tenfold. He estimated a million documents, and he's going to be looking at 10 million documents, Your Honor.

K) Administration of these Chapter 11 cases and of the non-debtor affiliates is under the direct charge of Mr. Bryan Marsal, a senior member of Alvarez & Marsal, who was appointed as the Chief Restructuring Officer of LBHI soon after the commencement of the Chapter 11 cases on September 15, 2008, and who was thereafter appointed Chief Executive Officer on January 1, 2009. Alvarez & Marsal has assisted Mr. Marsal as financial advisor and as restructuring experts and staff.

L) As the result of the approval of the emergency sale of LBH's North American capital markets business to Barclays Capital Inc. on September 20, 2008, essentially all of the

North American employees of the Lehman enterprise, approximately 10,000 individuals, became employees of Barclays Capital Inc. upon the closing of the sale transaction. As a result, to initiate, develop and progress the administration of the debtors' cases, Mr. Marsal & Alvarez & Marsal had to use over 200 of its employees for the administration of the debtors' cases. All of the foregoing exacerbated the complexities of the business and transactions that have to be reviewed and evaluated in order to determine the critical information that may be used to develop and formulate proposed Chapter 11 plans for the debtors.

M) Mr. Marsal, as CEO of the debtors, is a fiduciary under applicable principles of both bankruptcy and general corporate law. It is his duty, as it is the duty of the boards of directors of the debtors and their non-debtor affiliates, to act in the best interests of the debtors and, as a consequence thereof, the residual claimants, and not merely distressed debt traders.

N) Lehman Brothers, Inc., the broker/dealer affiliate of LBHI, is being administered under the provisions of the Securities Investor Protection Act. James W. Giddens, Esq. is the duly-appointed SIPA Trustee. The full extent of the transactions between the debtors and LBI have not yet been fully determined and will require a substantial amount of time to resolve.

O) At the direction of the Court, there has been and continues to be complete transparency in the administration of the debtors' Chapter 11 cases. An extensive Internet series of websites has been created that may be accessed by parties in interest. Mr. Marsal and A&M have appeared in Court on several occasions to provide reports on the status of the administration of the Chapter 11 cases and as to particular matters, as well as at meetings pursuant to Section 341 of the Bankruptcy Code. They have extended themselves and have responded to the fullest extent possible to all inquiries made of them and, wherever practicable, have met with persons asserting claims against the debtors and seeking information as to the debtors and the administration of the Chapter 11 cases, including the representatives of the hedge fund committee and its professionals.

P) All claims against these debtors are not due to be filed until November 1, 2009, and it is anticipated that well over one million claims may be asserted, including a large number of highly complex claims based upon derivative transactions, all of which will require careful analysis and may well require discovery and litigation.

Consistent with the applicable authorities on this under Section 1121, and the granting of extensions of the exclusive period, Your Honor, we believe that cause has been demonstrated in these very complex and large cases that would

warrant the extension which has been requested. We would also note, Your Honor, that neither the attorneys for this hedge fund committee nor the committee itself have complied with Bankruptcy Rule 2019.

Last evening, I believe, a 2019 statement was filed on behalf of Dewey & LeBoeuf LLP as cocounsel to this so-called ad hoc group of Lehman Brothers creditors. I would submit to Your Honor that the statement is not compliant with 2019, and the statement of White & Case, likewise, is not compliant with 2019, and consistent with the Bankruptcy Rule Your Honor may disregard the objection which has been interposed by them, or disregard it and it is not a factor in this case.

The objector says their consideration of the debtors' motion and the determinative factors relating to exclusivity extensions are, and the factors that are generally applied by Courts, are mere platitudes. I would point out to Your Honor that the precise same argument was made by Mr. Bienenstock in the Adelphia Communications court case before Bankruptcy Judge Gerber, and Judge Gerber, in response to that accusation when Mr. Bienenstock was representing the ACC Bondholder Group, also a group rather than a committee, in his characterization. Judge Gerber said "While the ACC Bondholder's Group characterizes the enumerated factors as “platitudes” (implying that these are less than worthy of being considered), I can’t agree. They’re objective factors which

courts historically have considered in making determinations of this character, as a means of ensuring that at least these factors are considered."

These factors, which historically, Your Honor, have been utilized by Courts in determining extensions of exclusivity are the factors that have been applied. The argument is made, Your Honor, that this is a liquidation case, and, therefore, it is different than the ordinary Chapter 11 case. There's nothing in the Bankruptcy Code, Your Honor, which distinguishes between an ongoing debtors' business and a liquidation. In fact, there are usually many more problems in a liquidation case, because of the need to resolve the claims in order to get to a position in which you can determine what type of plans might be used.

In addition, Your Honor, there is no foregone conclusion that every single debtor in this case is going to be subjected to a plan of liquidation. It may very well be that one or more of these subsidiaries will have a plan of reorganization. It may have an ongoing business of some type. And there may very well be, Your Honor, as we go on in the next eight months to a conception, there may be a business coming out of these Chapter 11 cases in which an entity will be formed that may be engaged in the business of providing services in similar situations in the future that may have significant value.

The options are all open, Your Honor. And Your Honor has to take into account, as I said before, the first four, or maybe even five months of this case, was operation stability. Trying to establish a normalcy in the administration of the estate. And that did not occur, and it was recognized even by the Walt Disney Company. The original motion requesting the appointment of an examiner was made in October of 2008. It was agreed upon the parties that it would not be appropriate to appoint an examiner at that point in time because we didn't have books and records. We didn't have any stabilized estate. And so the motions were put off, Your Honor, until January, when at least some degree of normalcy had been achieved. And it was at that point in time that the parties moved forward with the appointment of the examiner.

So, basically, Your Honor, there's only been five, maybe six, months of what you might call a period of normalcy, in which people can start thinking about which direction are these estates going to go in. And in a Chapter 11 context of the size of these cases and the complexities which these cases present in trying to unravel the transactions, and Your Honor has seen some of this in the derivative litigation, to say that these estates are now ripe for termination of exclusivity and multiple, one, two or three, plans of reorganization filed is totally inappropriate, Your Honor. It would be disadvantageous to the estates. It would create moments of uncertainty. Not

moments. Hours and days of uncertainty for the staff as to where they are going. It would be a negative impact on these estates, Your Honor.

To ask for eight months, in the context of what we are talking about, Your Honor, is not an extended -- extension. I shouldn't say -- is not an extension of exclusivity periods which is beyond the pale. And, with all due deference to the objector, Your Honor, there has been transparency in this estate. There has never been a time when Mr. Marsal has declined to meet with any person who has requested an interview or a meeting to discuss their claims. And that includes this committee, and before this committee the Walt Disney Company.

The door has always been open, and the administration of the estate has been vigorously pursued by the official committee. There are meetings every single week, and nobody, Your Honor, out of all of the creditors in this estate, and we're talking about potentially more than a million creditors, is objecting to this extension of exclusivity.

So I would submit to Your Honor one, the contention that there is no transparency in this estate is totally erroneous. It's just not true, Your Honor. Second, that these estates are ready for the proposal of plans of reorganizations, similarly, is not true. There is no way that a disclosure statement could be prepared that would give to creditors the information that an investor could use to make an informed

judgment as to whether to accept or reject a plan. Finally, the attack upon the integrity of Mr. Marsal, Alvarez & Marsal and the incumbent boards of directors, that they are motivated in their self-interest is totally spurious and without any foundation whatsoever, and not one shred of evidence.

These estates, Your Honor, have not reached the period of plan formulation. There are ongoing discussions every single week as to which direction to take these estates and how to collect the assets and how to build financial statements that can be relied upon. That's what's going on in this process. And to take the position, Your Honor, that this is just an ordinary liquidation and you can file a plan with a waterfall, from my perspective, Your Honor, is ludicrous. It just isn't so.

It's contended that Section 1129(c) trumps Section 1121. There is absolutely no authority for that at all, Your Honor. A Court, in construing the Bankruptcy Code, has to do it holistically. And it has to harmonize the provisions of the Bankruptcy Code. Section 1121 was put in there for precisely the kind of situations which we find ourselves today, where we have a large, complex series of cases that have not yet moved to the status of plan formulation.

In court with us today, Your Honor, is Mr. Marsal, who is prepared to testify in support of the application, the motion for the extension of exclusivity, and is here ready for

cross-examination, Your Honor. I would proffer his direct testimony with Your Honor's permission.

MR. BIENENSTOCK: Objection, Your Honor.

THE COURT: Mr. Bienenstock, your objection to the proffer, you simply want him called as a live witness --

MR. BIENENSTOCK: No.

THE COURT: -- or are you objecting to the fact that evidence is being put forth?

MR. BIENENSTOCK: The latter, Your Honor. If that's what they want to do, we'd like to take his deposition, bring our own rebuttal witness, and have an evidentiary hearing. The Local Rules, as we understand them, require that if they were going to pull a stunt like this they were supposed to get the Court's leave so that we could do all the things to make these examinations efficient for everyone, including the Judge. Not to call a witness out of the blue, and the cross-examination would be, basically, discovery and take many hours.

THE COURT: Mr. Miller, what's your reaction to that?

MR. MILLER: My answer to that, Your Honor, is we have to establish cause. It was our motion. He objected to the motion. He should have been prepared today to respond to anything that we did consistent with the motion, Your Honor.

THE COURT: Well, it occurs to me, and I'm perfectly prepared to move forward with an evidentiary hearing today, given the extraordinary circumstances, but I don't really think

this is an evidentiary matter. My take on this is that substantially all of the grounds asserted in support of the debtors' motion to extend exclusivity are matters that are not controverted. I don't believe that this is really a case at this moment, a contested matter at this moment, that requires evidence. It's a pure legal question. Unless, and this was certainly something that the ad hoc group of creditors could have done, unless there was a desire to take discovery prior to this in reference to some of the allegations of lack of transparency and the role of the board of directors, in particular, in managing the debtors' affairs at this point.

So I think I'm going to cut this off in this manner. I believe that this is appropriately a matter for legal argument. I am prepared to take judicial notice, as is my right, of everything that has gone on in the case and that is in the docket of the case, and I believe that that provides a sufficient record on the basis of which both you, on the debtors' behalf, can argue in support of an extension of exclusivity, and Mr. Bienenstock, if he's the principal objector, can argue against the extension. And I don't believe that we need evidence.

MR. MILLER: In that light, Your Honor, I will withdraw the request to put Mr. Marsal on the stand, and we will stand on our papers.

THE COURT: Okay.

MR. MILLER: Thank you, Your Honor.

MR. DUNNE: Your Honor, may I be heard before we get to the objector?

THE COURT: Sure.

MR. DUNNE: As Mr. Miller said, the committee supports the extension with the conditions we negotiated. At one level an eight month extension is extraordinary, and the committee considered the arguments advanced by the ad hoc committee, and to some degree we agree with, and we've always fostered that, you know, the paramount objective of creditor involvement and leadership in the case, and we think we've accomplished that. Similarly, we expect that the committee will be in the forefront of negotiating any plan and that that plan should be crafted with the debtors to garner broad creditor support.

Right now this case looks like a modified liquidation. But, as Mr. Miller said, they haven't foreclosed any options, and there may be operations that are ongoing post-emergence.

That being said, the reality of the case is obvious. No one could file a plan right now. This is the largest case ever to file. Indeed, the bar date is months away. Recognizing that reality the committee negotiated for additional disclosures in the hope of achieving even greater transparency.

And there's one clarification I have to make to Mr. Miller's remarks at this juncture. I believe Mr. Miller said

that we insisted on additional disclosures be made to the official committee. It's not just to the official committee. Those disclosures that will be made four months from now will be made publicly to the Court, will be filed publicly, and any party in interest will have the right to see them.

I do have to comment on the ad hoc committee's objection. We've worked with the ad hoc committee on a number of fronts to date. We've had good faith discussions with them. We've found many of the paths that we've contemplated with them to be constructive. But I have to have one comment, and this goes to both sides of the house right now. I think that there are a number of assertions and allegations in the pleadings that are needlessly inflammatory. A number of them, as Mr. Miller had said, are baseless, and I think that they're a bit of a sideshow for today. And I'll include in that the Rule 2019 comments, where I think Your Honor is aware that the case law is divergent on whether additional disclosures would be required. We're not sure that they would be in this case, but that can be teed up separately.

I think that the only thing in front of Your Honor right now is whether or not exclusivity should be extended on the terms outlined by Mr. Miller, and the committee, with the conditions we negotiated, wholeheartedly endorses that extension.

THE COURT: Okay. Thank you for that.

Mr. Bienenstock, I think it's your turn. As far as limiting your ability to participate in today's hearing on account of claim deficiencies in the 2019 disclosure recently made, I have not reviewed that disclosure, and I have reviewed your papers. So I know your argument, and I have, in the past, heard from your ad hoc committee of creditors. I will decline to call this an ad hoc committee of hedge funds, to the extent that that carries with it any connotation that may be negative. And I have heard from cocounsel for the committee as recently as yesterday afternoon. Mr. Shore, who was arguing on behalf of DnB NOR this morning, was here yesterday afternoon for a separate hearing relating to the Lehman case.

MR. SPEAKER: Metavante.

THE COURT: Yes. Metavante. And this has been a long Lehman week, even though it's only Wednesday morning. And I did hear from the ad hoc group in connection with the Metavante matter. I did permit argument, and I believe that an alleged 13.5 billion dollars in creditor claims commonly represented should be heard from. But, obviously, compliance with 2019 issues also must be satisfied. I'm not going to make any judgments today with regard to that issue. And to the extent that becomes an issue in the future we'll address it on some other day. So I'll hear from you now.

MR. BIENENSTOCK: Thank you, Your Honor. Good morning. Martin J. Bienenstock of Dewey & Lebouf for the ad

hoc group of Lehman Brother creditors. I will try my best to take into account Your Honor's comments of having read the pleadings, which I know from experience occurs. I do have some remarks I must make, however, because, obviously, the debtor filed a twenty-five page, approximately, reply yesterday, and that needs to be responded to.

THE COURT: I read that as well.

MR. BIENENSTOCK: Well, that was the debtors', so I want to respond.

THE COURT: Yes, I read yours and I read theirs.

MR. BIENENSTOCK: I'm sure. I'm sure. So I --

THE COURT: So I'm familiar with the purple prose on both sides.

MR. BIENENSTOCK: Right. There were things there that were also repeated this morning that need to be responded to. In respect of 2019, Your Honor, given all the remarks, I'll simply say there is a big issue. We agree with the committee. We highlighted the issue in the statement we did file, and in view of Your Honor's comments, while I had prepared an argument on that, unless Your Honor wants to hear it more later I'll defer that for when it's teed up.

THE COURT: I really don't want to convert the important argument on exclusivity into a discussion of Rule 2019 issues, particularly since the Rule is being modified as we speak and we're dealing with today's iteration of the rule.

But you should all know that at some point within the useful working lives of the people you represent their disclosure applications will likely be significantly greater. Why don't you proceed without dealing with the 2019 issues now?

MR. BIENENSTOCK: Okay. Your Honor, the ad hoc group is grateful to the committee for making progress on transparency and recognizing in its response the claims and issues that the group raised. In the group's view, strongly held view, a report four months in the future, with an extension of exclusivity for eight months and the concomitant transfer of the burden of proof on exclusivity from the debtor to any creditor who during those eight months would want to shorten it, is wrong, unacceptable, bad for the estates and bad for creditors. And that's why we're still here now.

Great things can happen in these cases if the Court does not extend exclusivity. First, the real stakeholders, all the creditors, can have a voice and a choice. It's axiomatic, it's obvious, it's indisputable, that when a debtor negotiates with the benefit of exclusivity a Chapter 11 plan, everyone negotiating with the debtor knows that they can't file any counterplan, any competing plan. So you're prone to take less. A level playing field is when everyone can file a plan. That makes the negotiations real.

But, more importantly, whether the distributions to creditors are all in cash, which we, frankly, think will not be

the case, or it's a combination of cash and some type of security or certificates in various entities. The entities will range from litigation trusts to, perhaps, real estate REIT or other type of portfolio that isn't wound down that may have some viable properties, to something having to do with the derivative operation. There will be distributions of cash and some types of securities in the plan that's ultimately confirmed in this case.

And when we say it's simple, we mean it's simple. We mean it can be done now, for the following reason. This is not a case where putting together a reorganization plan means you need a deal with the union, the IRS, the EPA and a bunch of secured lenders and a new financer. That is complicated. That takes time. That must happen before you can maintain going concern value of an ongoing business.

This is the opposite. We don't have a union. We don't have a financer to worry about. We have different types of assets. Some monetized. We're told now 12.2 billion in cash. Others derivatives, real estate assets, loans, possibly REO, whatever. And claims against foreign entities.

We know now that the unsecured claim holders in each debtor will share pro rate what comes out of that debtor. There's no need to treat one type of class differently. People you're going to keep doing business with get one thing. Trade creditors get another. That's not the issue here. Everyone's

going to get their pro rata share. Will there be issues as to intercompany claims? Of course. Just like other claims that won't be resolved. And when they are resolved, whether allowed, allowed in part, partly subordinated, totally disallowed, re-characterized as equity, the denominator will come better into focus.

When Enron's plan and disclosure statement went out the disclosure statement, to the extent it had to, projected roughly twenty cent returns plus or minus. Happily, many creditors are receiving eighty-five to a hundred cents. Why? Because in the year since confirmation many claims were disallowed, many affirmative litigations were successful, some of the ongoing businesses were sold for more than was anticipated. It was a happy event. Did creditors, when they were voting, care that the twenty percent estimate may go up or down? No. They knew they were all getting the same. Whatever it is, it is.

Another way of looking at it, Judge, here, is all of the things Lehman mentioned in its pleadings and a few minutes ago, very few are going to be finished when the eighteen month bell rings in this case, which, I think, is in March of 2010. Very few. And it's not even knowable today which will be finished and which not. And, to take an example, the item that they keep talking about, joined by the committee, as an absolute, an absolute bar to a plan proposal now, it's not a

bar at all. A bar date. Mr. Miller referred to November. The bar date is September 22. There's a subsequent November date for questionnaire answers. But let's see how this plays, because I want Your Honor to have an understanding of what can happen if Your Honor doesn't extend exclusivity. A plan can be proposed, let's say, in the next few weeks, next month. A disclosure statement will likely occur, say, sometime in September, latest October, but in that neighborhood. Obviously all current creditors on schedules can be given actual notice by e-mail and other mail. And the rest of the world, it's going to be online and in the newspapers. So there will be a disclosure statement hearing sometime in September or October, and by the time the plan goes out the proofs of claim will have been filed, to the extent there are any names that come in that are not on the debtors' schedules. So that's not a bar at all. Because one thing is for sure, which we pointed out in our objection. The bar date doesn't tell us the allowed amount of claims. It doesn't give us the denominator. It just confirms what we already know. There are a lot of claims out there, large in amount. So we'll have more evidence that they are large in amount and large in number when they come in. But it's certainly not a bar to sending out a plan.

And the expense, Your Honor, is key. And it's very important that we recognize what are the opportunities in this case to make a major impact on expense of administration.

Notwithstanding the comments from Mr. Miller about our attacks, and his use and his pleadings and in argument of our allegation of unjustified expense, I don't think Mr. Miller or anyone in this courtroom can find the words unjustified expense or words to that effect anywhere in our pleadings.

What we pointed out has many facets, but what's important for today is the Chapter 11 process is a dual work stream process. For every business decision, the debtor and its array of professionals sits down with the committee and its array of professionals -- and notwithstanding that the debtor basically has the edge in that discussion because, as it says in every one of its motions under 363 and 365, its business judgment should prevail -- there is this discussion, hopefully, we think, about all these major decisions with the dual sets of professionals.

That's not the way corporate America works. The successful corporations in America don't have their sets of professionals sit down for every decision with another set of professionals. That's occasion for the reasons we all know in Chapter 11, but that's a major, major expense. When a plan is confirmed, the debtor can have directors selected by the real stakeholders. It can have management, perhaps including some of current management. That's left to be decided, and hopefully the subject of discussions. But it will have one management, one set of professionals, and we will cut these

expenses in half. That's a major saving, given the level of expenses in these cases.

And again, we have not criticized the level. We don't know enough to criticize the level. But we do know from their monthly operating reports which we attached to our objection, I think the A&M billed something like 115 million in nine months or something close, and the lawyers more than 55 million. We haven't criticized it, as I said, we don't know enough to criticize it. And since I come from one of the firms, I would just as soon assume that it's all valid. But it's large, and it's larger when you consider a lot of the time is not simply spent getting ready to do the business transaction, it's getting ready to sit with the committee and make all kinds of presentations and then have their professionals pore through it.

All that expense, or at least a very substantial chunk, gets eliminated if we make this into a successful reorganized American corporation. And whether that corporation goes on in life forever or liquidates, successful American corporate management and governance is helpful to all creditors. That's what Your Honor can do today by not extending exclusivity; make that date come sooner for the benefit of all creditors.

THE COURT: Let me stop you for a second, Mr. Bienenstock --

MR. BIENENSTOCK: Yes.

THE COURT: -- because it's a nice rhetorical flourish, but I don't understand how this happens. The examiner is still in the midst of conducting an investigation -- we talked about it earlier -- on behalf of the Walt Disney company. You even submitted papers in respect of it. And I asked you to hold your remarks. And I'm not going to reopen that discussion now, I'm simply identifying that as a point in time earlier in today's hearing.

I know from the hearing that we had in June that the examiner's timetable for completing his report has been elongated -- to use a term that I read in your papers -- not because there's a desire on his part or on the part of his partners to generate more administrative expenses that they can put in their pocket, but because the task at hand is, by anybody's estimate, enormous.

How is it conceivable that any plan of reorganization that one might draw on the back of an envelope could be properly disclosed to global creditors prior to the completion of the examiner's report testing all manner of issues in this case, including the Barclays sale, which we just talked about within the last two hours.

I don't understand -- I understand the goal: cut expenses, increase transparency, have real stakeholders have a role in managing the process. I understand all of these

platitudes, because they are platitudes, the very same argument you make about the standards I'm supposed to apply in dealing with exclusivity, but the term actually applies to your argument.

Your argument is not based upon anything that feels like reality to me. It seems to be predicated on impatience, impatience with a process that done professionally, necessarily will take time. How on earth could anybody develop a confirmable plan before the examiner's report is done? How could anybody develop a confirmable plan before the bar date? How can anybody develop a confirmable plan without fully understanding the value of the assets that underlie what you've described as a forty plus billion dollar business? Well, okay, that's the basket, that's a broad valuation we could apply to the basket, but what's in it? And without being able to disclose what's in it, how can anybody make an informed judgment with respect to whatever this liquidation plan looks like?

Additionally -- and I think you know this --

MR. BIENENSTOCK: I hope you'll let me answer, Your Honor.

THE COURT: I'm not quite done.

MR. BIENENSTOCK: Okay.

THE COURT: Additionally -- and I'm sure you know this -- in the ordinary course of trying to fight exclusivity,

parties-in-interest could say we want an opportunity to file a plan. They attach the plan to their pleading. They attach at least a term sheet. They describe something that's different from what might otherwise be in front of the Court if we had simply the debtors' plan pursuant to exclusivity.

You say nothing about that. And while you talk in your hypothetical about "the plan" that might in some dream emerge in September, the contents of that plan nowhere have been described, including in your argument. So what are we really talking about? Is this just about impatience or do you represent a claim group that has a cognizable, confirmable alternative plan?

MR. BIENENSTOCK: Your Honor, I'm glad you brought it to the point. We can file a cognizable, confirmable plan in the near term. And I'll tell you why it's not attached and I'll answer your other contentions. And by the way, if your other contentions are correct, then I think what you've just foreshadowed to the world is there won't be a plan for many years.

Taking the examiner report as an example. The examiner's report is going to give one man's fact findings and opinions on some issues. Some people will agree with him, some people will disagree, some people will sue based on what he says. And that litigation will go on for years.

So Judge, if you think the examiner's report is some

type of -- the day of its filing is some type of triggering event, liberating event, now we can have a plan, I suggest you're very mistaken. What is it is it's going to be a man's opinion of what claims can likely be successful if litigated and what claims may not be successful. He'll probably be right in many instances, in some instances he'll be wrong. It will take years.

All the plan has to do, Your Honor, is reserve to the reorganized debtors the rights to bring the estate's causes of action, whether they're identified in the examiner's plan or whether they're not identified, because as Mr. Dunne pointed out earlier, the examiner's scope is not universal. It's not finding all causes of actions of all the estates. So there are other parties who never file reports.

Your Honor, how are we going to deal with that? Mr. Dunne doesn't have a date to file a report. The debtor never has to file a report. Is Your Honor saying that we can never have a plan, because we never know when their reports will come? Of course not.

THE COURT: I think maybe you're overstating what I'm stating, and I'm not sure it's helpful. My point -- and let me be clear -- is that there's a lot that's still happening that in the ordinary course of a well managed case should happen to the point of conclusion in order to provide reasonable disclosure.

There's a different issue which I think you're pressing. When Congress amended the provisions of 1121 in the 2005 amendments to limit the discretion of a bankruptcy court judge to extend exclusivity more than eighteen months from the filing date, I rather expect that Congress wasn't thinking about the Lehman Brothers Holdings bankruptcy case. And circumstances in bankruptcy have changed dramatically since then, as have circumstances in the economy. I won't get into the question of whether or not I think that is or is not a useful provision in mega-bankruptcy cases, because it may not be in terms of its practical application, but it's the law I need to apply.

I'm also aware that in the ordinary course of bankruptcy cases since 2005, instead of the problem that was supposedly fixed by the eighteen-month cap on exclusivity extensions, we have a different problem: cases that go on too fast a track, cases in which lenders pre-filing prevent a variety of milestones that have to be met that are incredibly unrealistic. That's the impatience of the marketplace, perhaps. And I believe that at some level what you're arguing is the impatience of the marketplace too --

MR. BIENENSTOCK: No, that's not --

THE COURT: -- because in reality, I believe that eighteen months may turn out to be a very difficult time within which the debtor will be able to file a plan or anybody will be

able to file a plan that is accompanied by the kind of disclosure that one would expect a reasonably informed creditor or investor would have to see in order to vote on that plan.

And here's really the point I'm making. Are you simply today, in effect, accelerating to today the date that might be in March of 2010 when exclusivity will have expired as a matter of law anyway, by saying that there's a futility factor here? Because that's one way that I can read your argument. One way that I can read your argument is that we should just get on with the business of ignoring exclusivity because exclusivity's not going to matter anyway. But you haven't quite made that argument.

MR. BIENENSTOCK: Well --

THE COURT: Do you want to make that argument?

MR. BIENENSTOCK: Yes, Your Honor, because the point is -- the point is that all of these things that we're talking about are not going to be finished by March of 2010. And I guarantee you, Your Honor, the debtor will propose a plan. So when I say I want to make that argument, I want to make it to prove to Your Honor that all of these impediments -- and I'm going to go back over Your Honor's list -- that all of these impediments to a plan are not impediments to a plan today. And Your Honor can say platitudes, and maybe I'll fall on my face, but I hope when I'm finished Your Honor will realize these are no platitudes.

Now, Your Honor seems to be concerned with disclosure. And I think, if I'm inferring the right message, it's disclosure so creditors know well, the claim amount is really approximately not 800 trillion, it's 200 -- or billion, and the approximate asset amount is something and the return is maybe 23 cents, 17 cents, something like that. If I'm close to right I hope -- my point, Your Honor, is that's not -- that's not the disclosure any creditor needs. Why not? Because they're going to get what they're going to get, and as long as the plan says all unsecured claim holders against each individual debtor share equally, why would someone vote no?

Let's say they come out with a plan and say we're going to give you fifteen cents. What does voting no get me? Presumably the fifteen cents is going to be everything that's there. If I vote no, it doesn't mean I'll get twenty. So why is that -- the numerator and the denominator -- why is that necessary for someone to know? We'll tell them the best information we have at the time.

As I explained in Enron, we were off on the low side. We guesstimated 20 cents; it's 85 to 100 in most cases. No one's complaining. And if it had been less than twenty, we have plenty of caveats that if claims came in higher, etcetera, if the market fell apart and we sold assets for less, it would be lower. But we had overwhelming acceptance because all the creditors knew we're getting what there is, in the best form

that people know how to give it to us: partly cash, partly certificates and different types of litigation trusts or real estate businesses. That's all someone needs for disclosure, Your Honor, to know you're being treated equally with everyone else. But you're going to have a streamlined company, excellent managers, excellent directors, it's going to get off the ground, you're going to eliminate this dual expense track.

And Your Honor, I have to admit, I don't know how you can call those platitudes. These are tangible real things that will happen. It is a legal fact. You confirm, you don't have committee. You don't have a committee, you don't have the committee's professionals. You no longer have to have a debating society on every business decision. That is a hard and fast saving. That's no platitude.

What's a platitude? A platitude is the debtor saying size and complexity. Yeah, there are lots of assets. Yeah, there are lots of debtors around the world. Enron is still dealing with foreign debtors all over the world. Nothing winds down too quickly, as Your Honor knows, especially in liquidations. But the claims against the foreign debtors in insolvency, ultimately there will be a distribution one day; it'll be sent pro rata to creditors.

I started with my example about the IRS, the union, the secured lender and the financer to make the point that size and complexity has meaning, it's not a platitude, when you can

identify the steps you have to do -- Union, EPA, secured financing, etcetera, trade creditors -- to survive as a going concern. That is not a platitude. That is real. It's tangible.

We can understand you have to go through all those steps. The words "size and complexity" here, just because there are a lot of assets, we know nothing's going to hold up confirmation if we tell creditors you're going to get your pro rata amount of what's there, and our assessment of what's there now is X or a range of X to Y. That's what I mean by platitude. It can be big but yet the plan is simple.

And why didn't we attach a plan? I'm glad Your Honor mentioned that. Two reasons. First, we didn't think that to have exclusivity terminated, our plan -- that this hearing has to turn into a confirmation hearing. The debtor is not going to preview its plan with the Court before it files it. We didn't think we should have to do that.

Having said that, I would have liked to, and let me tell you why we didn't. This is not being taken as impatience. It's not being taken lightly. If there's one thing that even Mr. Miller would agree about hedge funds is they want to make money, not spend it stupidly or frivolously. They're not here to propose a plan that you'll blast out of the water because you think it's a fantasy. They only want to propose a plan that they think Your Honor will confirm, and it'll have to be a

responsible plan and not just, as the debtor says, for some hedge funds to sate their appetites for profits. If this plan isn't great for all creditors with a lot of support, it's not being confirmed. We get it, Judge.

So the notion that we're here to do something frivolous is ridiculous -- or that it's a platitude is ridiculous. The reason why we didn't propose a plan, it takes some time and expense to go through the schedules that have been filed thus far, some of which are still being amended. It takes some time and expense to gather up the expertise you need to make sure you're doing it right. Some serious expense, which we are willing to spend, but not if after we spend it we come into this Court and Your Honor says oh, your objectives are platitudinal, get lost.

THE COURT: I --

MR. BIENENSTOCK: That's not --

THE COURT: Let me break in, only because I think you're starting to now not only demean Mr. Miller but you're starting to demean me.

MR. BIENENSTOCK: Well, I apologize.

THE COURT: And I think that's where I'm going to draw the line. What I said, and what I believe in your rhetorical excitement you're distorting, is that many of the things that you say in your papers and that you've said in your remarks this morning, are in fact platitudes -- references to corporate

America. This isn't a political campaign. This is a really large, indisputably complex, and incredibly important bankruptcy case. Rhetoric has its place, but let's deal with reality.

If you actually had the ability to propose a confirmable plan, or if you actually had the outline of a confirmable plan with the information presently available to you, you'd be saying more about it than just it's expensive to do and we didn't do the work to comb the schedules. Let's not minimize the really hard job that's associated with developing a confirmable plan in this case in the name of procedural advantage.

If, as, and when you, or anyone else for that matter, is representing a party-in-interest with enough skin in the game to be able to develop an alternative plan, you know full well that motion can be filed to terminate exclusivity. And Mr. Miller did just that in the Rockefeller Center bankruptcy case -- I can't tell you how many years ago -- and lost. That doesn't mean that at the right time such a motion can't be brought successfully in the right case. Whether this is the right case at any time between now and March of 2010, I don't know. But I'll tell you that today is hardly the right time, on the basis of broad generalizations, to suggest that the debtors shouldn't be allowed any opportunity to continue to maintain the exclusive right to propose a plan which is granted

under 1121.

And you also have a stiff adversary in the official committee of unsecured creditors that has filed a statement in support of the debtors' plan. So at a certain level, Mr. Bienenstock, you are representing, however we deem it, a rump group of self-selected creditors that has chosen sophisticated counsel to try to achieve an objective. Now, if that objective is today's record, so be it. If the objective is to say we need more transparency, that may be a different motion. If the objective is to say we should minimize administrative expenses in this case, I wholeheartedly agree. But I'm not sure an exclusivity objection is the means to those ends.

MR. BIENENSTOCK: Well, Your Honor, there's more to our motion. And Your Honor clearly has the belief that we can't propose a plan that's confirmable and responsible. First, I hope Your Honor accepts the notion that we know if it's not a responsible plan it won't get to first base. So that's the only type of plan we're talking about proposing. And it does take work to put together the people and the plan, and the expertise shouldn't be minimized, Your Honor.

And there's another phenomena going on here, Your Honor. These claims in this case trade for relatively little. A point was made, there's no one supporting us. Well, none of the creditors on the outside are supporting the extension. The

committee is. But they're here and they're paid from the estate to take a position on everything.

The message that we're here and others are not, I ask Your Honor not to interpret that we're some group looking for a special advantage. We are a group that bought up enough debt to have a stake, and it's worthwhile to try to increase the returns that will come out of this case. That's why we are here, and we realize that we do that for everybody, not just for us. But it still takes a lot more money to put it all together. And if we're going to put it all together and someone is going to have ideas that well, you don't have a bar date yet, you don't have an examiner report yet, you don't get to first base -- as I said, my clients are business people. They don't want to spend money frivolously.

But I think that I've given Your Honor -- I mean, it's a plan that treats every claim holder of one debtor the same. And that is going to be the plan here. The plans will differ and maybe one will say there will be a litigation trust and a real estate trust, and another will say just a litigation trust, but whatever the currency is, it's all going to be distributed pro rata, and it's not -- and inter-company claims can be determined before confirmation, at confirmation, or afterwards. Hundreds of billions of claims are going to be determined after confirmation no matter whose plan it is.

So Your Honor, the notion that there's not a real plan

possible, this is a liquidation, we're talking about pro rata distribution to the creditors of each debtors' estate. All the bankruptcy lawyers in this room know what that plan is. They could probably write the term sheet now. I'm not saying anything people don't know. But obviously we want to do it responsibly from a tax viewpoint, from an accounting viewpoint, from a management director viewpoint. We'd like to do it responsibly and that is going to cost some money. I don't think we should be faulted for not having done that already, but it is what it is.

I want to go on to discuss the other points of our motion which I think are important.

THE COURT: Okay. And I'm just going to note that it's 12:30. At least for me, this is a warm courtroom. People are standing. At some point, we're going to break for lunch and we're going to deal with the adversary proceeding portion of today's agenda after a lunch break.

I'm only pausing to make the following observation. To the extent that there are people in the room who are here on account of the adversary proceeding docket and they wish to leave, I will not be bothered by -- I'll stay where I am and people can just exit who might not want to watch this particular argument to conclusion. And that will be a fine thing if they wish to go and come back at 2 o'clock.

MR. BIENENSTOCK: Thank you, Your Honor.

THE COURT: Let's just pause for one moment while certain people are going to head for the hallway.

(Pause)

UNIDENTIFIED SPEAKER: Your Honor, can we get some estimation on how long Mr. Bienenstock expects to go on?

THE COURT: I was about to ask that, because it goes to the question of whether we take a lunch break that involves this contested matter as well. And given the way the elevator's functioning here, it's probably just as well that people leave in stages.

(Pause)

Mr. Bienenstock, about how long do you think you're going to be? And I'm assuming that Mr. Miller and/or the committee may have some further observations as well.

MR. BIENENSTOCK: My best guess is forty-five minutes.

THE COURT: Well, if you're going to be forty-five minutes, I think that we should take a lunch break. And maybe during the lunch break you can think of ways of making it shorter. That's not to say that I won't be happy to hear you for the full forty-five minutes. But I really do understand your argument, but I'm not going to in any way limit your ability to make it. Let's take a break until 2 o'clock.

MR. BIENENSTOCK: 2 o'clock?

THE COURT: 2 o'clock. We're adjourned.

(Recess from 12:33 p.m. to 2:02 p.m.)

THE COURT: Be seated, please.

Mr. Bienenstock.

MR. BIENENSTOCK: Good afternoon, Your Honor. I'm Martin Bienenstock of Dewey & LeBoeuf for the ad hoc Lehman Brother creditor group. I'm going to do my best on time. Your Honor, to start, I want to mention some undisputed facts in the record and then some facts for which there's no evidence in the record. The undisputed facts I'd like to call the Court's attention to are all from our objection to exclusivity, so I'll just cite the paragraph number.

Paragraph 5 that the estate has twelve billion dollars in cash that earns miniscule return, in fact Mr. Marsal at the July 8 341 meeting himself acknowledged the pitiful return on the money because of today's interest rates.

Paragraph 14, LBHI provides no example of a destabilizing effect that competing plans would have in this case.

Paragraph 18, derivative transactions will continue after the debtors' requested eight-month extension would expire.

Paragraph 28, the debtors comprise a forty-five billion enterprise. These are all things that the debtors' reply did not dispute at all.

Paragraph 29, the debtors' shareholders have no hope of any recovery from these estates. They've no incentive to

monitor directors and officers.

Paragraphs 32 and 33, this was our mathematical showing that the A&M asset management bonus now exceeds the amount that could be paid because it's capped by the amount of fees, twenty-percent of fees, and if there were confirmation now the bonus would be larger than twenty-five percent.

Paragraph 37, that the operating report in May and June for LBHI was literally the one line that we quoted -- or summarized in our objection.

Paragraph 38, that meaningful expense reduction can only occur under a confirmed plan.

Now, there's no evidence in the record to show the following: how a creditors' plan would imperil other creditors; that there's a need to resolve intercompany claims before confirmation. In fact, as I explained earlier, we all know that in all large cases there are going to be many very large claims by and against estates that won't be resolved till after confirmation.

There's no evidence in the record showing we need an examiner report before there can be confirmation. In fact, the committee's investigation, the debtors, the examiners, they'll all lead to potential claims; some will be brought, some won't, some will succeed, some won't. We won't know that for years to come.

There's no evidence in the record showing a need for

foreign proceeding resolution to confirm. As we know from other large cases with foreign proceedings, these things take time. These estates' claims against them will be resolved over time. Hopefully some money will come back.

And on that subject, Your Honor, since I think Your Honor asked me as part of the colloquy this morning, I think -- Your Honor was wondering if we were asking for this for some other reason than wanting to file a plan. The answer to that is no. But in terms of what could happen in terms of transparency, information, moving the process along, well, the debtor could be given dates to report on things it says stand in the way of confirmation: intercompany claims analysis -- and I mean report to all creditors, not just the committee -- intercompany claims analysis, foreign proceedings, substantive consolidation. Since the eight-month (sic), if it's granted, will take them, I think, right up to the eighteenth month, which the limit -- clearly the debtor's going to have a plan in process before the eighteenth month passes. So it would be useful if they made reports on these things to all creditors in the next month by month by month.

Again, I want to emphasize that, for the reasons I've already gone over, and I don't want to take the time to repeat them, we don't think any of these stand in the way of confirming a plan now, but they do. My concern is the Court does or might. So there must be progress on this. Let them

make reports to creditors so we see how these things are being resolved so we can get to confirmation.

Also, on that subject, since I mentioned the eight months, obviously that we want no extension. The biggest problem with the eight-month is that anyone who wants to propose a plan in between would have the burden of proof to shorten exclusivity. For that reason, we think that either the extension should not be eight months, or the Court, if it's going to give it, should say if someone comes in to shorten it, the burden of proof remains on the debtor to show why it should continue with that point.

I want to talk about the fiduciary point for a minute. The debtors' reply, I think kindly, I'm not sure, but cites an article I wrote in 1985 about fiduciary duties in bankruptcy cases. And essentially, you know, I can't take credit. The articles cites to commodity futures trading commissions, a Supreme Court decision and the definition of fiduciary in Black's Law Dictionary, and other sources. Basically a fiduciary is simply a person who's supposed to act in someone else's best interest. It's not a person with a halo or angelic or special. It's someone who's supposed to act other than in that person's own interest.

And from what I read in the debtors' reply, they're saying, well, that's the answer, Mr. Marsal is a fiduciary, so what are you worried about? And from my perspective, from my

client's perspective, that's not the answer; that defines the problem. And what I mean specifically is this: If -- when someone is supposed to act in someone else's best interests, it's relevant to know what pressures are on that Court to act in someone else's best interests or in that person's own best interests. If you're simply hired to do a job for someone else, there are no counterforces.

In this situation, we went through the mathematics of the asset management bonus not to criticize Mr. Marsal, and there's no criticism in our pleading; not to say fees are unjustified, the debtor made that up; but simply to show a counterforce that has occurred in this case. The full bonus cannot be earned without the fees of 115 million expanding to nearly twice that.

THE COURT: Well, Mr. Bienenstock, the way I read your papers, you suggested that because there was an economic incentive associated with prolonging the number of hours spent, that, in effect, this particular fiduciary had a reason to keep this process going as long as possible to make the most on the twenty-five percent. That's how I read your papers.

MR. BIENENSTOCK: Well, mathematically --

THE COURT: Did I read them correctly?

MR. BIENENSTOCK: -- that's -- we showed that as a mathematical truism.

THE COURT: So it's possible for someone reading those

papers to think that perhaps you're suggesting that a human being who is also a fiduciary might be tempted to prolong the process. That seemed to be the suggestion of your papers.

MR. BIENENSTOCK: Right. We were showing the counterforces on a fiduciary that happens to exist in this case.

THE COURT: But that's not to suggest that just because that's mathematically true that's what motivates a person who is truly fulfilling fiduciary duties, because the economic incentive wouldn't be a true counterbalance to doing the right job.

MR. BIENENSTOCK: We agree a hundred percent with that.

THE COURT: Fine. At least we agree on that.

MR. BIENENSTOCK: Okay. There's also no evidence in the record to support the debtors' contention in its reply at paragraph 3. It says, quote, "The objective is a simple scheme to enable speculators to use the Debtors' assets and data to sate their own appetite for profits. This is the very motivation that contributed to the demise of the Debtors," end of quote. Total whole cloth, Your Honor, there's nothing, no evidence that they offer in any part of this record, that shows that the objective is to enable the speculators, that they're calling my clients, to get any special advantage. Do they want to make money on their claims? Like everyone else, of course

they do. They want to maximize their recovery. But is there some particularly negative wrongful part of this? No. And they have no evidence, but they make it up.

And they make it up again in their reply at 17, where they say my clients ignore the need to protect interests of all claimants and not just bondholders and distressed debt investors. I don't want to repeat the whole morning, but I did mention that we fully understand that when exclusivity ends we have to propose a plan that Your Honor likes, that wants (sic) to confirm. Other creditors are going to have to support it. It's going to have to be fair. It's going to have to maximize value.

So the notion that we're trying to do something that just benefits the clients who are spending the money to try to improve the process is simply totally without evidence in this entire record.

At paragraph 22 of the reply, they contend that the group's demand for control imperils other creditors. They say, quoted, "It's manifest that the hedge funds want to take control of the Debtors' boards of directors and access all of the information that will enhance their positions and direct the administration of the Chapter 11 cases to satisfy their objectives." Again, no evidence for that statement whatsoever. The plan we would propose, of necessity, would have to have great directors rallied around by the people voting on the

plan. That's how you get people to support it. And the notion that the debtor has converted our pleading into some evil request for relief designed to benefit only a few creditors is telling about the debtor, Your Honor. Why is the debtor making that up? There's no evidence and they cite no evidence for their statements. Why is it doing that as opposed to saying we think there are the following obstacles to a plan, intercompany claims, Your Honor, here's how we're doing -- here's what we're doing to resolve those obstacles? That is not coming forward. But the animus, the venom, based on no evidence, that comes through loud and clear.

A few things from the argument this morning, Your Honor. Mr. Miller cited Smart World after having said that Grayson-Robinson has nothing to do here; might have been dicta, but I think the Second Circuit's dicta that the purpose of dicta -- that the purpose of bankruptcy is to get creditors paid is as valid when they said it then as now. And the fact that they said it in the context of a Chapter X/XI contest is of no moment.

But Smart World certainly doesn't support what Lehman is claiming. In Smart World, a creditor purported to settle an estate cause of action when the bankruptcy court approved the settlement. And the Second Circuit said, until you're given authority to do it by the bankruptcy court, you can't settle a cause of action. In no way does Smart World support the notion

that exclusivity should be extended to maintain the debtor in control. There's no presumption. Congress knew how to grant the presumption when it wanted to; it starts the debtor off with 120 days. But there's certainly no presumption now, and Smart World doesn't get them to where they want to be.

THE COURT: Well, I'm going to disagree with you on this one. I don't think that that was the purpose for which Smart World was cited by the debtors. It wasn't about exclusivity as much as it was the reasonableness of the debtor-in-possession being the principal party to propose, because it is the debtor-in-possession that is truly in control of the case. Creditors have an opportunity to participate actively, as your standing here demonstrates, as the creditors' committee's role in the case demonstrates, as the role of individual creditors throughout this bankruptcy case demonstrates. But absent converting your motion into a motion for appointment of a trustee, which I don't think you want, but you certainly could bring such a motion if you wished, it is the debtor-in-possession that is entitled to an exclusive period absent good cause being shown by you for not extending the exclusive period. And I believe that based upon my review of the initial motion and the reply papers just filed the other day that the debtor has presented ample good cause for extending exclusivity under the extraordinary circumstances of the case. I understand you disagree, and you have a right to

do that, and that's what we're here to talk about, but at least as it relates to Smart World, and I'm quite familiar with the case, it was the creditors' committee that was seeking to take control of that case without apparent authority, and the Second Circuit chastised the committee for doing that and, frankly, chastised the bankruptcy court for permitting it. And I understand the case and I understand why you're making the point you're making, but I'm just disagreeing with your gloss on it.

MR. BIENENSTOCK: Okay, I don't think any -- I'll move on.

THE COURT: Good idea.

MR. BIENENSTOCK: Adelphia, Your Honor, it's interesting that the debtor cites Adelphia because I'm really happy for this Court to look at the big picture of Adelphia. Towards the end of the case, when the debtor had a plan pending, as they point out in their pleadings, I was representing a group that wanted to terminate exclusivity and file a creditors' plan. And the judge denied us that right.

And then we went to confirmation and plan was confirmed, over my client's objection. And we pointed out many illegal parts of that plan -- we believe they were illegal; the bankruptcy judge obviously did not -- and said there would be no stay pending appeal because he didn't think there were even issues that, I guess, could be arguable.

Well, it went up to the district court, and District Judge Scheindlin found five grounds on which the confirmation order could be reversed. And when -- if Your Honor reads her decision -- you probably have at some point -- when you read the decision, although the final words are phrased in the words of the statute, I think a strong possibility, a reasonable possibility, of reversal, when you read the district court's analysis of the issues it's real clear how forcefully the district court felt there should be reversal. But the stay that the Court granted was conditioned on a 1.2 billion dollar bond which was in excess of what our clients had in stake in that contest.

So the bottom line is, a plan with probably five illegalities in it was confirmed and consummated. Had there been competing plans in front of the bankruptcy court, I think the chances of that happening would have been a lot less. But after so many years in bankruptcy with only one plan on the table, that's what happened.

We don't think that's a great example to cite. I understand the debtors cited it to show that we argued there that when you say things like size and complexity are platitudes, and I said them, and the Court obviously did not grant our objection to exclusivity, it said, well, that's support for Your Honor not agreeing with our agreement that the size and complexity is a platitude.

But I just want to leave that subject with this. It's not that the standard is a platitude, that the law is wrong. It's that when the law says size and complexity, it doesn't mean that you just have to show billions of assets and lots of issues. You have to show why the size and the complexity stands in the way of confirmation or formulating a confirmable plan. That's what we contend is missing here. There can easily be a plan that's confirmable.

When they propose a plan, we're not going to have all the answers. It's not going to be possible to tell creditors in a disclosure statement reliably what they will receive. But if they know they're getting the same as everyone else and that debtor, and they like the structure and the way the business is going to be run going forward, that's all you can ask for; why not vote for it? There's nothing better available.

So we think that it's not that the standards are platitudes and shouldn't be followed; it's that the debtor hasn't put any evidence in this record, and we think there is none to put in, why those factors that it cites really do stand in the way of confirming a plan now.

And, you know, I guess that's just a point of certainly disagreement with me and the Adelphia decision and possibly this Court, but that's our analysis of it.

To close, Your Honor, I want to make a few points very clear. My clients came to court today to get permission to

propose a plan which they would propose in the near term, and for no other reason. If that can't be, I've put on the table things that we think the Court can order for the debtor to do; so there will be no excuses in the future why a plan can't be proposed, and that is, give the creditors' reports on intercompany claims, foreign proceedings, substantive consolidation analyses, taxes, anything else they contend would be an obstacle to confirmation.

The one-line operating statement for LBHI and for each of the other debtors, it's not compliant with Local Rules and it's unacceptable. And we pointed out that when the debtors talk about transparency, they list what they filed, the meetings they've attended. When you go to what they filed, starting with the operating report, one line for a company that had -- they say had 600, I think, 89 million in revenue in one month. One line: beginning cash, cash in, cash out, foreign currency exchange, ending cash. That totally undermines the notion of transparency. That's not disclosure. That's not being transparent. That's really telling creditors virtually nothing. And then on the same day they filed that, they file an 8-K and they trump it, their filings of 8-Ks in their request to extend exclusivity. And then when you go to look at the 8-Ks, what do they say? We attach it to our pleading. They say don't rely on that operating report, that one-liner, because we didn't apply GAAP, it's not audited, this, that and

the other.

That's not -- in substance, that's not transparency. That's not to say A&M isn't working hard and all the rest. But it is to say that, from a creditors' point of view, sophisticated creditors who know how to read numbers, the information being furnished is so scant and superficial, doesn't move the ball along and it doesn't comply with the Local Rules.

And if the Court is going to extend exclusivity but perhaps take some steps or orders to move the case along towards more transparency, et cetera, certainly filing complete operating statements, we submit, should be right up there.

So I guess to summarize where we have to leave this is, for the reasons mentioned, we don't think they've shown any cause, especially when you consider there's no harm demonstrated why a competing plan submitted now would be harmful. Frankly, we think it would be phenomenal because it would immediately kindle all kinds of discussions to get constructive things done rapidly. But if exclusivity is going to be extended, we ask for the shortest possible time; for the burden of proof to remain on the debtor if someone comes in to shorten it; for the debtor to provide its creditors' reports on substantive consolidation, intercompany claims, foreign proceedings, taxes and anything else it thinks might be an obstacle to a plan.

And, finally, I just want to assure the judge, Your Honor, that we came here today to get permission to file a plan that would be supported and trumpeted and benefit all the creditors. Nothing we did would only redound to our benefit, because we don't think for one second the Court would allow that to happen. Why waste our time proposing a plan that only helps us or gives us an unfair advantage compared to everyone else? It was never in our minds. We don't think it would be a total waste of time and money. We came here to do something that would benefit us and all other creditors equally. And I hope Your Honor accepts and appreciates that, even if Your Honor concludes that we shouldn't be able to propose a plan in the near term.

THE COURT: Okay, thank you.

MR. BIENENSTOCK: Thanks.

THE COURT: Mr. Miller, do you have some remarks?

MR. HARVEY MILLER: Harvey Miller for the debtors. Your Honor, I will try to be brief. Mr. Bienenstock ended by saying that the monthly operating reports are basically one line. I have the monthly operating report, Your Honor, for May and June of 2009. It's eight pages, including a substance of financial information. That's number one.

Number two, on July 8, just a few days -- a week ago, there was a 341 meeting, which was attended by Mr. Bienenstock's clients. The meeting took over two hours.

And a report was given, Your Honor, which I'm holding in my hand, consisting -- well, the pages, unfortunately -- here they are -- of twenty-two pages of detailed financial information, and questions were answered during the entire two hours. And not one person in that meeting, and it was attended, I think, by over 200 people, Your Honor, including Mr. Bienenstock's clients, not one person raised an issue about transparency; not one person raised an issue about reporting; not one, including his clients, Your Honor. So this issue about transparency is a red herring.

And just the other day, Your Honor, we signed a confident -- the estate signed a confidentiality agreement with White & Case so that they would have complete access to the reports which are given to the creditors' committee. Their confidentiality agreement is the same confidentiality agreement that Harbinger signed to get access to the reports that were given to the creditors' committee.

So as I say, Your Honor, transparency is a red herring. And for Mr. Bienenstock to stand her, Your Honor, and say that he has not attacked the integrity of the professionals and the fiduciaries working on this estate I find incredulous. He says in paragraph 34 of his objection, "The only way A&M can fully earn 52.4" -- I'm sorry -- "52.5 million dollars bonus it is otherwise contractually entitled to, or any additional bonus money, would be to stretch out the case until its fees crest at

210 million dollars or more. The stakeholders' problem, however, is that increasing the forty-five billion dollars does A&M no good. A&M only benefits if the cases last long enough to build 210 million dollars." Now, if the implication of that sentence, Your Honor, is that -- is not that they're trying to drag this case out, then I don't know what the implication is, Your Honor.

I think Your Honor put your finger right on the problem here. This is impatience of the market. These are traders. They are anxious to trade in these claims. And Mr. Bienenstock stands here, Your Honor, and he says oh, we don't have to worry, this plan will be very simple, it'll say fifteen cents on the dollar, everybody'll be happy with it. But what he forgets is there'll be trading in those claims. The recipients of this fifteen cents, or this proposed fifteen cents, won't know what the real value is. But distressed debt traders will come in immediately and trade.

Now, take the Enron situation where they said twenty cents was what will ultimately be the dividend. Mr. Bienenstock reports it was seventy cents. Somebody was trading in those claims as soon as the plan was proposed and as soon as it was confirmed. And the poor creditor, who is not involved in the inner circles of these cases, he doesn't know, or she doesn't know, what's happening. And this is exactly the problem that Judge Beatty had in the Revere Copper and Brass

case and the trading of claims where she imposed the rule that you have to tell the seller what's going on in the case and what the true value of these claims is. No, I would submit to Your Honor that there was an attempt here to take advantage of people who don't know what the claims are going to be worth.

Your Honor said that there has been ample cause demonstrated by the debtors, and we agree with that, Your Honor. In addition, Your Honor, it was Mr. Bienenstock who moved for the appointment of an examiner. And he said it was very important in that motion to ascertain what are the intercompany claims that we -- we can't go forward in this case until we know what the intercompany claims are, till we know what are the values of these estates. And now suddenly, Your Honor, the examiner is going to be only one man's opinion. And there are going to be a lot of erroneous conclusions by the examiner. Well, then I have to ask Your Honor why did they move for an examiner, what was the point of having an examiner, if it's only going to be one man's opinion?

And we're not submitting to Your Honor that it's absolutely necessary to have the examiner's report to have a plan. We are going to hit the eighteen-month's deadline. And as Your Honor pointed out, in the 2005 amendments, clearly Congress did not have in mind mega cases. And we're putting aside the whole 2005 amendments, questionable in terms of bankruptcy practice and bankruptcy jurisprudence.

But you can't dismiss the fact that the examiner was appointed here with probably, Your Honor, the broadest charter I've ever seen an examiner have. And it was done for the purpose of having more transparency in this estate than in any other estate. And that's what has been the goal from day one, from the days that Bryan Marsal stood here and made lengthy reports to Your Honor. And there is no hesitation about making reports.

Mr. Bienenstock talks about cutting expenses, but here we have been sitting here, Your Honor, almost a half a day on this particular motion, which, as Your Honor pointed out, the facts are indisputable. Ample cause has been shown in connection with extending exclusivity in these cases. And there will be efforts, and we may not be at a position, Your Honor, in eighteen months where we have claims. But if Your Honor remembers, in January, I think it was, of 2009, Mr. Marsal, and this is no secret, stood before Your Honor and he said it's going to take eighteen to twenty-four months to come up with the solution -- hopefully the solutions in this case. And it hasn't varied from that from that day to day. And all the creditors were aware of that, Your Honor.

And we have a, I have to tell Your Honor, a proactive creditors' committee, proactive financial advisors on that committee, who are doing the job that they are delegated to do under the Bankruptcy Code.

So there isn't a transparency problem, Your Honor. And Your Honor has been very clear on making it a mandate in this case that there be transparency. There isn't selfish incentives and motives on the part of the fiduciaries or the professionals, Your Honor. And the argument about best business practices, as Your Honor pointed out, have nothing to do with the administration of this estate. These fiduciaries that are administering these estates have the obligation, and they recognize the obligation every day, that their duties are to the entire universe of the parties-in-interest in this case. And that's what they're working for, and that's what the creditors' committee is working for, and that's why there's complete cooperation, Your Honor, with the examiner.

These investigations that are underway are going to play into which of these estates may be solvent. It may be that LCPI is solvent. It may be that LBSF is solvent. Until those facts get more firm, there cannot be, Your Honor, a proposal of a plan of reorganization. Just to say to creditors oh, it's very simple, you'll get at least ten cents, so just vote for this plan; that's not a plan of reorganization. There is no way of giving them the information they can make an informed judgment. Yes, they may want to turn that down because they think if the estate goes longer we'll get a firmer view of what are the assets and what are the recoveries. And that's what we intend to do.

So, Your Honor -- and I also would point out, Your Honor, in the Enron case the period to file a plan was extended for a year and six months. The solicitation period was extended for two years and eight months. The Adelphia case, which Mr. -- which we all have alluded to in this situation, just in connection with what Mr. Bienenstock said about the appeal, yes, on Judge Scheindlin's initial first opinion she pointed out that there were four or five potential errors and a probability of success on appeal, and she set the bond a billion-two.

Mr. Bienenstock doesn't tell you that later there were serious negotiations about reducing the bond to below 1.2 billion dollars. In fact, when it went to the Court of Appeals, Judge Newman kept saying to Mr. Bienenstock what are your clients prepared to do, what bond would they be willing to put up. And Mr. Bienenstock never came up with more than ten million dollars, Your Honor.

And, finally, Judge Newman said okay, the Second Circuit doesn't have jurisdiction, I'm sending it back to Judge Scheindlin. And it went back to Scheindlin, and there were further negotiations about the size of the bond. And these bondholders that Mr. Bienenstock represented, we're not going above ten million dollars. And if you read the second opinion by Judge Scheindlin, the criticism she levels at the appealing bondholders and accuses them of gamesmanship, that they were

using the appeal process to get leverage in negotiating a change in the plan in their recoveries, that, Your Honor, is a factor in that case.

So the fact that there was a potential defect in Judge Gerber's ruling has nothing to do with whether exclusivity should be granted in these cases. But the facts are not as Mr. Bienenstock proposed them.

What this objection is about, Your Honor, is control, is control of the administration by a small group of creditors that have different objectives than expressed by the official committee and other parties-in-interest. And in that context, Your Honor, the debtors' motion to extend exclusivity for the eight-month period should be granted. Thank you, Your Honor.

MR. DUNNE: Your Honor, I'll be brief. I don't have more than minute or two of comments. And I really rise to address one of Mr. Bienenstock's broadsides against the committee and its professionals. Whether he got carried away in a flight of rhetorical fancy or not doesn't really matter. His comments with respect to the committee were inexcusable. He argued that the position of the official creditors' committee should be discounted because we are paid by the estate. The insinuation that we represent our pocketbooks and he represents the creditors generally is absurd and deplorable. I expected better from my esteemed colleague.

But let me just contrast our role and his. The

committee owe its fiduciary duties to all of the unsecured creditors, Your Honor; his group does not. The members of the creditors' committee have duties of confidentiality; the members of his group do not. The members of the creditors' committee have reviewed all public and non-public information; his group has not. The committee has faithfully and selflessly discharged its duties. We've spent countless hours with the debtors trying to maximize the value of this estate. We've analyzed the motion to extend exclusivity and support it.

Even on its own terms, the aspersion fails. We are not beholden to the debtors for the payment of our fees. The Court, Your Honor, will approve allowance of the fees, and there is an independent fee committee for exactly that process. We're the professionals trying to line their pockets. They would not only be breaching their duties and besmirching their reputations and characters, they would be objecting to motions, not considering them in good faith. They would be seeking to litigate, not seeking and obtaining settlements. They would be looking to get on a soapbox to filibuster and grandstand in a chaotic attempt to shorten to ten months the exclusive periods in the largest case ever to file. The committee has no desire to get on such a soapbox, but even if it did there's already someone there. We have nothing further to add, Your Honor.

THE COURT: Thank you, Mr. --

MR. BIENENSTOCK: I must -- two quick comments.

THE COURT: Okay. I mean, let's try to keep away from personal accusations if we can.

MR. BIENENSTOCK: Counsel for the committee totally, and probably by accident, hopefully, misstated what we said. The point I made is, when the debtors is no one is supporting us to let exclusivity end, I said no one is supporting them either. This is a case where claims trade very little. It's not in most people's interests to spend the money. When it comes to the committee, they're not spending their own money. It wasn't an insult; it was just a fact: They are not constrained by the expense because it's not their money. It's a fact.

In respect of Judge Scheindlin, Your Honor, Mr. Miller doesn't tell Your Honor -- I don't know if he knows or not, but he certainly knows some facts -- that when we went back to Judge Scheindlin, she would not reduce the bond to a level that was my client's, even, upside.

THE COURT: Whatever happened before Judge Scheindlin is a matter of --

MR. BIENENSTOCK: Okay, but it was --

THE COURT: -- interest perhaps to those who were involved in the Adelphia case but of no interest to me --

MR. BIENENSTOCK: Good.

THE COURT: -- and certainly of no relevance to today's motion.

MR. BIENENSTOCK: Good. It was -- I needed to respond, and it was not that the bondholders did anything bad or had a bad motive. They were being asked to post a bond more than their upside could be. And that's the only reason why they didn't post.

THE COURT: Okay.

Well, this was hotly contested motion, wasn't it? Not just in the rhetoric but in the stridency of the papers that were filed. And I believe that, based upon my review of the papers filed by the ad hoc committee, that at a certain level the reaction is a direct result of a fair reading of the prose. I believe that Mr. Bienenstock, who is a sophisticated and experienced lawyer, knows that there are consequences that flow from filing papers of the sort that he filed on behalf of his group. He certainly had the right to say what he said, but the fact that we ended up having a fairly heated argument during today's omnibus calendar, I think, was foreseeable. It was also foreseeable that Mr. Miller and his team would file reply papers defending the integrity of all of the professionals who are working on the debtors' behalf to move forward this plan process.

There has been a lot said, both in papers and in rhetoric today, about platitudes. That's perhaps an unfortunate choice of words. But it is, in fact, what was written about in the context of the Adelphia case, which we

have now made several references to. The only meaningful reference, however, is the reference to the decision of Judge Gerber to extend exclusivity in that case.

The Adelphia case was, by my reckoning, a very complicated case involving significant intercompany claims and different constituencies. With all respect to the Adelphia case, it pales in comparison to this one. All kinds of hyperbole gets tossed around the courtroom about the size and complexity of the Lehman case. It becomes almost trite to say that this is the largest and most complex bankruptcy in history. But let's face it, it really is. And the complexity is at a level that the Court sees only at the surface. As I have said in earlier hearings, it is obvious to me, based upon what I see going on in the docket, that that is merely a reflection of all that is going on that isn't docketed, all of the activity that is required on the part of those currently working for Lehman Brothers and for the creditors' committee and all the professionals, to unravel what is perhaps the most complicated financial disaster in recorded history.

Without getting into the specifics of that work, it is apparent to the Court that that work is ongoing and that we are not anywhere near the end of the beginning. This is a process that may well go beyond the eight-month period that we're now talking about to extend exclusivity. That's all the time that Congress has allowed a debtor-in-possession, and it applies

whether or not we're talking about a retailer, an automobile company or the fourth largest investment bank on the planet. It's a one-size-fits-all provision that doesn't necessarily fit all circumstances well, but it's what I must apply.

That comment might be particularly appropriate if made in March of 2010, but it's July of 2009 and I deal with a contested matter regarding the future of a plan process in a case in which it is obvious that the plan process is on everybody's radar screen, but it will take considerable time and effort to move beyond concepts to term sheets, to proposals, to negotiated terms and conditions, based upon facts not surmised as to what the facts might be.

The fact-gathering and analytical process is still ongoing. That is apparent not only from the transcript that will be read after today's hearing but from the transcripts of every other one of the omnibus hearings that have taken place since September 2008. Transparency, the sharing of information, cooperation, investigation, these are the hallmarks of this bankruptcy case up to this point. But it will take, I believe, in fairness, more time to be thoughtful about what a plan should look like that will truly maximize the returns of all creditors.

And I agree with Mr. Bienenstock, the business of bankruptcy is about returning dollars to creditors or, if they're in Norway, krones to creditors. But it takes a lot of

thought and attention to develop a plan in a setting this complex that is truly better than a mere liquidation. Otherwise, if I take Mr. Bienenstock's argument at face value, if this is really so simplistic, maybe we toss away all the costs and expenses that are here and we have some trustee come in with a single professional doing whatever has to be done to maximize value. But my best guess is that Mr. Bienenstock and a chorus of others would get up and say don't do that, that would be an extraordinarily stupid thing to do. And I think it would be.

I don't want to get into what I believe are the motivations of the parties who have been litigating here on this question it, frankly, doesn't matter. I take at face value what everybody has said. I also believe that I think there is some value to the process in having debated this question today. At a certain level, I think that it puts the debtors and their professionals on notice that the ad hoc group, as it's presently composed, or as it may be composed in the future, or some other group that may form with different participants that have significant enough economic interests to hire expensive lawyers, will be looking over the shoulders of the professionals who represent the debtor-in-possession, and the professionals who represent the creditors' committee, and the professionals who represent the examiner, and everybody else who is being paid ultimately out of the estates' assets.

That's a healthy thing, and that's part of transparency. But in terms of the fundamental question which is before the Court today, it seems to me clear and almost beyond reasonable debate that the debtors should be entitled, to the fullest extent of the law, to as much time as they need to develop their best plan, their view of the plan of reorganization that most appropriately addresses the complexities of this unique set of circumstances. And exclusivity was designed, in part, to give debtors that privilege, unless it's being abused, and there's absolutely nothing in this record to suggest that the privilege has been abused in any respect.

Under the circumstances, I grant the motion as supported by the creditors' committee and, in effect, as modified by the creditors' committee's position, to extend exclusivity for eight months with the understanding that at the midpoint, roughly four months from now, there will be a full report provided by Bryan Marsal, and such other individuals as may be appropriate to come into court to make that presentation, concerning the progress that is being made in developing a plan; I'm assuming that will be a well-attended hearing and we'll have over full capacity for that day.

Let's go on to the next item.

MR. HARVEY MILLER: Thank you, Your Honor. Your Honor, would it be possible to get a five-minute recess?

THE COURT: Excuse me?

MR. HARVEY MILLER: Would it be possible to get a five-minute recess?

THE COURT: Absolutely, and I think it's a good idea. Let's take a ten-minute break till 3 o'clock.

MR. HARVEY MILLER: Thank you, Your Honor.

THE COURT: We're adjourned.

(Recess from 2:52 p.m. until 3:07 p.m.)

THE COURT: Be seated, please. Good afternoon.

MS. COLLINGS: Good afternoon, Your Honor. Scarlett Collings on behalf of Lehman Brothers Special Financing. Rather than have a master or mistress of ceremonies as we walk through some of the adversaries, I thought we might just pass the baton from one to the other, if that's acceptable?

THE COURT: Perfectly acceptable.

MS. COLLINGS: Thank you, Your Honor. The first matter this afternoon is the Lehman Brothers Special Financing versus Harrier Finance. I think there are two items on today's agenda under the Harrier adversary proceeding. There's the committee's motion to intervene, which I understand is unopposed, and the pretrial. With respect to -- and I don't -- others can address the committee's motion to intervene, but I do think that there was no opposition filed vis-a-vis that intervention mention.

With respect to the pretrial, Your Honor, currently set for hearing August 5th is the motion to dismiss of AFLAC in

this case. And just to give the Court some brief background on how we've progressed, LBSF filed the complaint May 20th; motion to dismiss was filed June 22nd. LBSF's opposition brief, opposition of the motion to dismiss, is due next week; we're preparing to file accordingly. We anticipate we'll have good arguments and good discussions on August 5th. However, today we have been approached by counsel for some of the other defendants in these derivative adversary proceedings that are also on the docket today about trying to have a call this Friday to further coordinate, if possible, some these derivative adversary proceedings that may have overlapping issues. While there may be overlapping issues among the cases, they are still unique.

And so we, from LBSF's perspective, we've committed to trying to have a global call, if you will, on Friday to work out some of those coordination issues. Because of that, I'm not sure that the current schedule will remain intact. If it does, then we will see you on the 5th for argument and we will file our papers next week. If the takeaway from the call is that there's some type of alternative coordination or scheduling that makes sense, then we'll notify the Court accordingly.

THE COURT: Okay. And this is also a good opportunity for me to make a completely general comment, because that last comment I viewed as a general comment that applied to a variety

of pending adversaries, and this has to do with what I am increasingly seeing as a burden on my resources as it relates to the adversary proceedings. And a suggestion that we have a chambers conference -- well, we can certainly talk about some of this on the record -- about perhaps changing the format for dealing with adversary proceedings as part of the omnibus hearing, I have noted that. And I'm not sure which month this happens, but Lehman omnibus hearing dates are moving from once every three weeks to once a month.

MS. COLLINGS: Yes, sir.

THE COURT: We started out at the beginning of the case with twice a month. Today's hearing follows a hearing that took place yesterday afternoon at 2 o'clock in the Metavante matter and a hearing that was adjourned, that was originally set for Monday, in connection with a real property sale. So that if you look at it from the Court's perspective, this is a week in which, although it didn't happen, Monday was reserved for a Lehman hearing, Tuesday afternoon in fact was a Lehman hearing, and it took a while and it ate deeply into my own preparation time for today's hearing. Additionally, based upon the nature of the case, there are matters that are on the provisional agenda that end up getting adjourned, but we never really know which one it's going to be or when it's going to happen.

And I will tell, in effect, the Weil Gotshal side of

the room that I found this week very burdensome. And it made me come to the conclusion that we need to do something particularly about the adversary proceedings. I just received more notebooks in connection with this omnibus hearing as it relates to the pleadings in all the adversary proceedings and the various pleadings in the contested matters that we've heard already that it's really a lot for one person to digest for one day in which everybody's got a specialist out there in the courtroom to represent a particular issue in the case but there's only one brain sitting up here that needs to comprehend all the stuff that's going on, and I'm finding it a little challenging.

It seems to me that one of the ways that we could profitably discuss some adjustments would be for the adversary proceedings either to only be at 2 o'clock on an omnibus hearing date so that people who are here only for the adversary proceedings don't have to sit through an entire morning of matters that don't concern them, or, alternatively, for there to be a separate day each month reserved for adversary proceedings in the Lehman case, because the adversary proceedings, at least it seems to me, tend to involve different sets of lawyers and, at least at this stage, involve motions to dismiss, motions to intervene, motions for summary judgment, motions to stay discovery, whatever may be the procedural matters that are coming up, but they are of great interest to

the parties who are litigating them but not necessarily of general interest.

So I'm going to suggest that -- this is kind of a long way of saying it -- that I think we need to consider an appropriate way to better manage this calendar. And I recognize that what happened this week is probably aberrational, and I don't know what's going to happen in August, I don't know what's going to happen in September, but I have a very strong sense that there are some very big issues that are being pushed out for ultimate hearing and determination, and I don't think that those issues are best heard on an omnibus hearing date.

MS. COLLINGS: I understand, Your Honor, and we will confer and try to suggest a more manageable, human schedule for --

THE COURT: For everybody.

MS. COLLINGS: -- handling the adversary proceedings, for everyone, absolutely.

With respect to the Harrier action there, Your Honor, right now we have a clear path for the briefing schedule and for the hearing, but we will try to confer on Friday with counsel that are involved in a number of these adversary proceedings and see if there's a resolution on further scheduling that can be reached, and we'll report back.

THE COURT: Fine. That's great. And my suggestion,

for what it's worth, and it's not anything other than a suggestion, is that having a separate day for the adversaries may make sense.

MS. COLLINGS: Absolutely, Your Honor. Thank you.

The next item up -- the next -- I'm sorry, the UCC, Your Honor.

MR. COHEN: Good afternoon, Your Honor. David Cohen with Milbank, Tweed, Hadley & McCloy, here on behalf of the committee. As Ms. Collings alluded to, there was a motion to intervene filed by the committee; no objection was filed on Monday. We filed a certificate of no objection that was circulated to the parties with the proposed order.

THE COURT: Welcome to the case; you're in it.

MR. COHEN: Thank you. And further to Your Honor's comments just now about generally scheduling, the debtors and I have had conversations about trying to work in that protocol and we've been working with some of the defendants in the adversary proceedings to come up with a more humane schedule for the Court. So I think we'll continue those conversations and hopefully be able to present a proposal to the Court.

THE COURT: That makes sense to me. Thank you for your efforts.

MR. COHEN: Thank you.

MR. RALPH MILLER: Good afternoon, Your Honor. Ralph Miller here on behalf of Lehman Brothers Holdings, Inc. and

Lehman Brothers Special Financing. I believe the next item up is LBSF and LBHI against American Family Life Assurance Company of Columbus, case number 09-1261, which we commonly call the AFLAC case since that's the primary name of the defendant in the adversary proceeding.

This is closely related, Your Honor, to the next adversary proceeding that is up: Lehman Brothers Special Financing v. BNY Corporate Trustee Services. The two parties in Lehman Brothers Special Financing and BNY Corporate Trustee Services are also parties to the AFLAC case, Your Honor. And the central legal issue is very much the same in those two proceedings.

And a point that I need to begin to make, as the Court may recall when we were together before, there is a proceeding in London brought by a party known as Perpetual Trust. And the judge in London has under advisement the issue of whether he will grant some time for those matters to be resolved, the bankruptcy law issues in these cases, before he renders a final ruling in London on some questions.

THE COURT: Let me ask you a question about that, because when I saw a reference I think it was in the Bank of New York's papers to the hearing that took place July 7, 8 and 9, I think --

MR. RALPH MILLER: Yes, Your Honor.

THE COURT: -- in London. It wasn't clear to me what

kind of hearing that was. Was that full evidentiary hearing? Was that a legal argument on a dispositive motion? What was that? Who was the judge? What happened? Does it relate to anything that I'm dealing with here? Is this a situation that calls for court-to-court communication? Those are my questions.

MR. RALPH MILLER: Well, first of all, I'm not sure I know that name of the judge, but perhaps we can determine that. My understanding was, and others can -- I was not there personally, Your Honor, so this has been reported to me. It was -- a submission of evidence was made. One of the issues before that Court was the request of Lehman Brothers Special Financing, Inc. for a stay of that proceeding. We understand that the plaintiff in that case, the Perpetual Trustee entity, has asked that there be a part ruling on at least the English law issues. We understand there has been no decision by the Court. I believe that July 28th is projected to be a decision date by that Court, and that will deal with both the stay question as well as perhaps -- or perhaps not dealing with issues of English law.

My understanding is that that Court was not asked to rule directly on questions of U.S. bankruptcy law; the question was whether it was going to care, in effect, or whether it was relevant to wait for some ruling by this Court.

We have no idea how that's going to go, but we're

optimistic. And it is the request of Lehman Brothers Special Financing that at least some time be granted for this Court to proceed and consider this ipso facto issue. And for that reason, we want to maintain a reasonably expedited schedule.

As I mentioned before, our understanding is that there is a summer recess for the London court. So that essentially it's not a question of getting this done in July or August, for example; it's more a question of coming back to this issue promptly in the fall rather than letting it slip off to next year, for example.

THE COURT: So I'm confused. What happens on July 28th?

MR. RALPH MILLER: Well, one of two things -- or one of several things, Your Honor. The Court, first of all, may rule under English law on whether there is any English legal reason why the request of Perpetual Trust to enforce the documents as written should not go forward. It may or may not rule on that.

That's not going to have a direct impact on what's happening here because the question of how the English law applies to those documents is not before the Court in any of these proceedings. Essentially, no one's asked this Court to rule on the English law aspects of that.

We have asked this Court to look at a clause which adjusts the priority of payments based on the bankruptcy of, in

some cases, LBHI, and in some cases LBSF. In these cases, it is LBSF, that clause, whether that's an ipso facto clause, and the scope of the safe harbor, especially Section 560. We understand, and that's been presented to the English court, for example.

The summary judgment that was filed here was presented. There was a declaration that was presented by Ms. Fife, actually, and others to explain how the U.S. bankruptcy procedure viewed that. And we understand that a number of interesting questions were asked by the judge, and he seemed to be engaged in trying to understand how that might proceed.

We believe that one of the outcomes, and certainly what LBSF hopes will be the outcome, is that at least that issue will not be decided and there will be no final ruling from the English court before it goes into the summer recess on actually directing anybody to pay money or do anything, and that that would allow time for this issue to be presented to this Court in an orderly fashion. And there is, of course, a summary issue now pending in the second adversary proceeding that's going to be up, the adversary proceeding with just the Bank of -- BNY Corporate Trustee services now.

And we're going to propose in this proceeding, Your Honor, that we have cross motions for summary judgment, and I believe that that's going to be acceptable to the parties here.

I see Mr. Schaffer is waiting.

Do you want to provide some more guidance on the issue?

MR. SCHAFFER: Your Honor, Eric Schaffer, Reed Smith, on behalf of BNY Corporate Trustee Services. Just to fill in a little bit for Mr. Miller, there was a proceeding. There were three full days on July 7th, 8th, and 9th in the High Court of Justice before the Chancellor, Lord Justice Morritt, and there were a number of issues there. The plaintiffs in the cases there initially were the Perpetual Trustee Company Ltd., which sued the trustee, BNY Corporate Trustee Services. There also was a second action initiated by Belmont Park Investments, also against the trustee. Lehman Brothers Special Financing did intervene in both actions.

In the course of the proceedings, the plaintiffs are noteholders who claim not to be subject to the jurisdiction of this Court, and they are looking for a decision, as I understand it, that under English law they take priority. The trustee is looking for a decision that supports its position with regard to direction and indemnification.

I understand Lehman's position, and while I certainly defer to Mr. Miller, I understand it to be looking for a stay of the English proceeding while this Court might go forward; or alternatively, I believe, from my initial review of the transcript, that they propose a number of bases on which the

English court might come to the same decision that they are advocating here.

In terms of the timing, I believe that the Lord Chancellor anticipates having a decision on some of the pending issues before the end of this month. And with that, I may have exhausted my knowledge of what happened in court there.

THE COURT: Okay. That's helpful, though. Thank you.

MR. RALPH MILLER: Your Honor, I began with that, because I want to make it clear that we want to accommodate the desires of the English court to move forward. On the other hand, these are important issues. They require complete consideration, and we don't believe that it's necessary to do these in a way that will not give the Court or the parties ample time to submit them.

One of the issues that we have had discussions about is the fact that there may be some benefit to consolidating a hearing on some of these summary judgments that present the same issues. We're flexible on that. And one of the things we're going to do is have a conference call, as Ms. Collings said, try to arrange a conference call with other parties.

In full disclosure to the Court, some of these same issues overlap a case where the parties are, as far as we know, not all here, and that is the so-called Ballyrock proceeding. That has additional issues in it; it's in the Venn diagram. The circles are not the same. That has some ineffective

termination issue in it, for example, that are not present in some of these other cases. It's a little more complicated case. It's an interpleader, as the Court may recall.

So what we would suggest at this point for the pretrial, and we can have others express their view, is we would like to ask the Court's permission to file summary judgment in the AFLAC case. It will look very much like the summary judgment that's already been filed in the second adversary proceeding on the list, which we call the Saphir case. And we understand that AFLAC, and perhaps BNY, wish to file summary judgment also in that case. So we would have -- and we propose a simultaneous briefing schedule, yet to be resolved. And the primary issue on trying to resolve is to try to consult with parties in the Ballyrock case to see if we can coordinate that.

Now, in Ballyrock, there is a motion to dismiss that, which is scheduled for hearing on August the 5th. We don't believe that there is a necessary conflict between a motion to dismiss and summary judgments. They're not dealing with the same standard. And it's not at all clear to us how a ruling on a motion to dismiss might prejudice any of the parties in the AFLAC case or in the so-called Saphir case, the second case. But in any event, we understand that perhaps AFLAC has a desire to try to delay a consideration of that motion to dismiss so that it will not move forward more rapidly. We're happy to

talk about that.

And I think as far as the interests of the estate are concerned, our primary concern at this point is getting an orderly resolution of these issues, with full briefing, and also accommodating the desire of the Chancellor in London to move forward expeditiously on the issue so it doesn't bog down.

THE COURT: Those seem to be very desirable goals. Are there any issues that I need to know from other parties about --

MR. RALPH MILLER: Well, let me let others speak to this.

THE COURT: -- achieving this goal?

MR. RALPH MILLER: And, of course, the official creditors' committee we'd like to have express its views, and the other parties.

THE COURT: Okay.

MR. COHEN: Your Honor, David Cohen again, with Milbank Tweed. In the AFLAC adversary, we had filed on Monday, at docket 21, a stipulation of intervention. So we're just awaiting the Court's ruling on that. But with respect to the more substantive issues --

THE COURT: With stipulation, you're in.

MR. COHEN: Thank you --

THE COURT: Assume you're in.

MR. COHEN: Thank you very much. I'm two for two

today.

THE COURT: What are you going to do when you're in? Are you just going to -- are you going to be watching and participating, or can I expect papers to be filed on the merits?

MR. COHEN: We're going to expect -- what we would hope to see is papers filed on the merits, working closely with the debtors, because I think our interests are aligned there. And to the extent that there are arguments that we think should be made that the debtors aren't making, we will be additive. But in no way do we intend to duplicate the debtors' efforts and expect the debtors will be taking the leading role here.

THE COURT: That makes very good sense.

MR. COHEN: With respect to scheduling and summary judgment, as Mr. Miller alluded to, there have been discussions about aligning summary judgment in this case and the next case that we'll consider, which is the Perpetual one.

THE COURT: Just so we're clear. When you say "this case and the next case", I just -- we should identify what those cases are.

MR. COHEN: Certainly. This case being AFLAC, which is item 8 on the agenda, the next case being the Perpetual case, the case which has the companion case in England; so, items 8 and 9. There have been discussions this morning about aligning summary judgment briefing and hearings. And I think

the committee is amenable to making sure that we do that in as an efficient way as possible.

THE COURT: I take it, while the parties are different and the transactions are different, the legal issues are, for all practical purposes, overlapping?

MR. COHEN: Certain of them are. And to the extent that those certain ones are, we think they should be dealt with together. And then, as Mr. Miller mentioned, there are other transactions like Ballyrock that may have other issues outside the scope. But we think, rather than the Court hearing the same case and the same legal issue three weeks in a row or three months in a row, if we come up with one day for adversaries --

THE COURT: Maybe by the time I hear it the third time I'll finally get it.

MR. COHEN: Exactly. But we also think, just for efficiency, to get everybody here to be heard on that issue, it makes sense to align the scheduling. And we're working with everybody to make sure that happens.

THE COURT: I think that actually is a desirable goal, and I'm glad you're working toward it.

MR. COHEN: Thank you.

MS. HENRY: Good afternoon, Your Honor. Sally Henry, Skadden, Arps, Slate, Meagher & Flom, LLP, on behalf of American Family Life Assurance Company of Columbus, or AFLAC,

as it's known on TV and here.

I've heard three themes today from the Court: One is efficiency; the other is unnecessary duplication of effort; and the other is a recognition of the magnitude of these issues. And I think what you've been hearing from everyone here is that we want to help you and all of us to be efficient; we want to help you and all of us to avoid duplication of effort; and we want to make sure that, given the magnitude of these issues, given the fact that for the first time in some of these structured finance products that are all over the world and the billions of dollars -- I know Lehman, I understood, sold tens of millions of these -- dollars' worth of these products, that the issues under 362(b)(17) and 560 will be looked at in a logical way.

I recognize the interest in moving things along because of what's going on in Perpetual, but I would point out to the Court that this whole discussion that you heard about Perpetual isn't the AFLAC case. And I'm pointing that out because it shows how these cases are all -- which is the one that's up on the calendar now -- the cases are all intertwined.

So what we proposed is that all the parties -- and it's not just Ballyrock; I understand that there are 560 and 365(b)(17) issues also possibly raised in Harrier, and others of them -- get together on the phone on Friday and try to work out something so you are not hit with one after the other,

where all the parties have a chance to make sure that you, when you make your decision, have everyone's thoughts before you and you're not whipsawed with one thing one day, one thing the other day, extra issues about law of the case, or that type of thing. So we can do it as efficiently as possible. And that's our goal.

We're going to meet on Friday; hopefully we'll all come to a resolution. We've done a lot of work in the halls today and in the breaks and made some progress on that. And we will report back to the Court. If we have issues, we'll contact the Court -- the clerk to see if we could have the conference you mentioned earlier, Your Honor, because we think these are real important issues, and it's also -- they're real big issues, and we could have a mess on our hands if we didn't make it rational.

THE COURT: Well, I appreciate what you're saying, and I certainly laud the cooperation that appears to be going on among counsel. One question I have, and maybe it's too soon to comment on this, is it reasonable for me to anticipate that, as a result of the conference that is taking place on Friday among interested counsel, that there may be an adjustment in the schedule applicable to hearing motions to dismiss and motions for summary judgment in these various cases, particularly those that are listed for August 5?

MS. HENRY: There is some possibility with respect to

that. At this point in my discussions, I haven't seen any interest in that from the Ballyrock people. But there are the Harrier people. We have to investigate to see if there's overlap. If there is, we'll let you know just as soon as possible. We want to get these issues resolved and make it as easy for you as possible.

THE COURT: I appreciate that. It's not about anything other than my schedule that I'm asking this question.

MS. HENRY: Yes.

THE COURT: And it's not that it's an issue for the Lehman Brothers case. But I have a very active trial schedule over the next few weeks, and for that reason I don't have a lot of days that are not currently committed to something between now and August 5.

MS. HENRY: Right.

THE COURT: For that reason, if it turned out that the parties wanted to pick another day that wasn't August 5, I would be most pleased.

MS. HENRY: So would we, Your Honor, frankly, but we felt it would be fair to talk with everyone else. What we would like to do, what we'd like to see, is a slight movement so that everybody can get together, so that you can have everything together. And from what I've heard about the other case, Perpetual, it seems that would work. That's what we will be proposing from our point of view on the call Friday.

THE COURT: Okay.

MS. HENRY: And we hope that we can get people to agree. We don't want to have to litigate law of the case or ask you to reconsider something that wasn't before you the first go-around.

THE COURT: Well, hopefully you'll have a productive meeting on Friday.

MS. HENRY: Thank you very much, Your Honor.

MR. SCHAFFER: Your Honor, Eric Schaffer for the trustee. With regard to the AFLAC adversary proceeding, we concur with everything that was just said by AFLAC's counsel. The next case, as we seem to be merging the two, the Perpetual litigation, is really on a different track. That's the one where we filed a motion to dismiss because Perpetual's not here. We are not prepared to go forward with summary judgment on that for the obvious reason that we still have pending a motion to dismiss.

That has been scheduled before the Court for August 5. I don't know that I care whether it goes forward then or at a later date, but I do want to make clear that we have not agreed to proceed with summary judgment in a case where we have pending a motion to dismiss.

THE COURT: Okay.

MR. LACEY: Your Honor, may I address this?

MR. MILLER: Is that about this proceeding?

MR. LACEY: It's about Ballyrock.

MR. MILLER: Oh, good. Thank you.

MR. LACEY: Your Honor, Robinson Lacey, Sullivan & Cromwell. I represent Barclays, which is the largest noteholder in Ballyrock. You will recall that I've been trying to get that motion to dismiss teed up and heard for quite -- for months now. And I'm just standing up so that we don't get, sort of, run over by the herd here.

As briefed in the motion to dismiss, the two central issues in Ballyrock are whether the termination of the swap was prohibited by a provision unique to the Ballyrock indenture -- unique at least in that it does not appear to turn up in any of the papers in these other deals -- and whether the resulting -- whether the subordination of the swap termination payment under the indenture is unenforceable as a forfeiture under New York law, it being an indenture that provides that it's governed by New York law. The papers for these deals are English law papers governed by English law, and that's why you have an English judge working on the English law issues concerning the enforceability of that provision. So as we see it, there is very, very little overlap.

The other issue is that -- the other point is that Ballyrock's termination occurred before LBSF went into bankruptcy, so there's no 362 or safe harbor issue in the case; I gather there is in these other proceedings.

So to the extent we're drawn into these discussions on Friday, our view will be that the efficient thing to do is to proceed with the Ballyrock motion, which presents separate and discrete issues, do that on time. If we could schedule it for 2 instead of the omnibus hearing on the 5th, that would be great, but I do think we should try and get that out of the way.

THE COURT: Thank you.

MR. RALPH MILLER: Your Honor, Ralph Miller again. I just wanted to clarify to make sure I was understanding the Court. When you said you would favor some change from August the 5th, I gather you're not talking about moving it earlier, Your Honor.

THE COURT: You got it correct.

MR. RALPH MILLER: I just wanted to make sure I was hearing that correctly, Your Honor.

THE COURT: And by the way, I'm not advocating that anything be moved.

THE COURT: I'm simply noting --

MR. RALPH MILLER: Well --

THE COURT: I'm simply noting that the luck of the draw has given me a particularly rich summer of work, and I have a very, very full trial calendar over the next few weeks. I'm perfectly prepared to meet all the current schedule dates including August 5. I was simply noting that if by chance it

turned out that there was some movement later in August, that would actually benefit me in the sense of having more time to deal freshly with these issues. But I'm perfectly prepared to deal with the schedule that we already have.

MR. RALPH MILLER: Well -- and, Your Honor, certainly one of the things that the estate is always concerned with is whether there is some imminent danger of injury to the interests of the estate by delay. And in all of these proceedings, as we understand the facts, wherever the money is, it is either gone or it's safely somewhere probably invested in interest. So some time delay is not directly impacting the estate in an adverse way, and we certainly want to accommodate the Court's calendar as best we can.

This is, I think, perhaps a good segue if we might talk about some housekeeping matters with regard to the matter that we keep talking about as the next matter, number 9: Lehman Brothers Special Financing versus BNY Corporate Trustee Services, case number 09-01242. And if I might, shall we move to that? I believe we're ready to go to that, unless someone else wants to be heard on this other matter.

On that, Your Honor, we have a housekeeping proposal. There are three items up in that proceeding today: There is a pretrial scheduled and there are two motions to intervene. One of the motions to intervene is by the unsecured creditors' committee and is supported by the debtor and Plaintiff LBSF.

We think it's simple and straightforward. We think the motions to intervene do impact the pretrial, and much of what we would say in the pretrial has already been said because it's a part of this coordinated group.

But the other motion to intervene which has been filed by plaintiffs in the Wong adversary proceeding, case number 09-01120, presents a threshold timing issue that the Court may want to consider as a matter of docket control. And then we are certainly prepared to argue that motion to intervene if you would like to proceed.

The defendant in that adversary proceeding, BNY Corporate Trustee Services, has requested that both of these motions to intervene should be deferred until after its motion to dismiss. Now, it's motion to dismiss, to be clear, is not primarily on the merits but has to do with this question of whether there's an indispensable party, Perpetual Trust.

We have agreed on a briefing schedule and, as you know, that's set for August the 5th. The plaintiff, LBSF, believes that both of these motions to intervene are right; particularly the motion of the official unsecured creditors' committee, we think, should be granted promptly for their participation.

And we also think that the facts are not going to change any with regard to the Wong motion. We don't think that those parties are part of this group where there are

overlapping issues that require their participation. They're not parties to the contracts in issue in this adversary proceeding or the prior proceeding we were talking about, the AFLAC proceeding. They're separated from any party in this proceeding by an intervening party, as we can explain if we go into this. We think that -- which is called Pacific Finance. And we think those facts will not change.

So, as far as we are concerned, there's no reason not to go forward with that. However, if the Court, as a matter of docket control, would like to defer that intervention motion for a later hearing, there's also no prejudice to the estate in doing so. So we're actually neutral on whether you go ahead and hear that motion to intervene today or would like to defer it to some later time. It will take a little time to present, but we're prepared to move through it promptly. And so if the Court wants to, it may wish to consider whether it wants to go forward on that motion. Or do you wish to have us just go into that motion? And I think perhaps BNY Corporate Trustee Services would like to be heard on its request to defer that.

THE COURT: Okay. I'm neutral too, other than the fact that it's late in the afternoon.

MR. RALPH MILLER: Right.

THE COURT: I'm prepared to deal with the motions to intervene now, but before dealing with them I'd like to hear from counsel for BNY who's asking that I not hear them.

MR. RALPH MILLER: That's what I was suggesting, Your Honor, is perhaps this threshold issue made sense to consider first.

THE COURT: I'm prepared to hear it. And Mr. Schaffer may be very persuasive, given that it's a quarter to 4.

MR. SCHAFFER: Well, if nothing else, I'll be briefer. Your Honor, you understand we filed a response and not an objection. Our response -- I won't detail it -- it notes that the real party-in-interest here is Perpetual. They're not here. We have a motion to dismiss pending. The concern --

THE COURT: May I ask you a question about Perpetual?

MR. SCHAFFER: Yes.

THE COURT: To the extent you can share this and have had any contact with their representatives, directly or indirectly, do I understand correctly that Perpetual is unwilling, for any purpose, to submit to the jurisdiction of the bankruptcy court for purposes of allowing all parties to be present for a complete adjudication of that legal issue?

MR. SCHAFFER: That is my understanding.

THE COURT: And has any stated reason been given, other than they just think they're better off in the U.K.?

MR. SCHAFFER: I think that's a correct assessment.

THE COURT: Okay.

MR. SCHAFFER: Your Honor, we're not here on the

motion to dismiss. We appreciate particularly that the committee has a special status under the Code. That said, if Perpetual can be joined, if it will come in, we think that it's appropriate to give them an opportunity to respond to intervention motions. If they cannot be joined and they are an indispensable party, the motion to dismiss is granted, intervention becomes moot.

We really don't want to be second-guessed by Perpetual, and I think you've heard us state that theme before. And it's with that in mind that we think that any decision on the intervention motions should be deferred until we have had an opportunity to argue, get a decision on the motion to dismiss. Your Honor, that is the basis for our objection.

I do have a few additional comments that relate to the debtors' opposition to intervention by the Wong plaintiffs. Without going into great detail there, the last of their arguments is that the trustee is fully capable of representing the Wong plaintiffs in the -- what I'm calling the Perpetual litigation. We are not Wong's trustee; we don't owe them an obligation. Indeed, we don't owe anyone an obligation without direction and indemnification. We don't have that from Perpetual, which is our holder. So I simply want to correct any misstatement or anything that may be related to our motion to dismiss as far as the debtors' response to the Wong intervention motion is concerned.

THE COURT: I've heard what you've said, although I have no idea if it's true that your client owes no duty absent direction and indemnification. It may be, given that we had a whole conversation this morning about fiduciary duties, that those duties exist. If that's your legal position that's fine, but I'm not going to allow it to be part of the record as if my silence means that it's true.

MR. SCHAFFER: No, and Your Honor, I'm really not trying to get into the issues that will be before the Court on the 5th or whenever we argue the motion to dismiss. I simply did not want to remain silent with regard to any statements by the debtor that might suggest we have some affirmative obligation to appear on behalf of Perpetual, something that we have denied.

THE COURT: Okay. I understand that's your position as it relates to the timing of the motions to intervene, because I understand your principal argument to be that you believe more time should be allowed to give Perpetual an opportunity to appear and be heard as to whether or not the intervention should be granted as being the principal reason for deferring consideration. And inasmuch as you've said that Perpetual has already indicated, directly or indirectly, that they have no intention of appearing, they have opted out of the chance to come out, one way or the other, as to the interventions. And I see no reason to delay giving them

consideration today.

MR. SCHAFFER: I understand.

THE COURT: So your motion to defer this is denied.

MR. COHEN: Your Honor, on the merits of the committee's motion to intervene, I think Mr. Schaffer recognized that the committee stands in a special position. We have a statutory right recognized by the Second Circuit in Caldor to be heard on any issue in this case including --

THE COURT: I recognize it too. Your motion to intervene is granted.

MR. COHEN: Thank you, Your Honor.

MR. DAVIS: Your Honor, Jason Davis of Coughlin Stoia on behalf of the Wong plaintiffs in adversary proceeding 09-01120. We've moved to intervene in this case. I know it's late in the day and there's been a lot discussed today, so I appreciate the opportunity to be heard. I do want to say that if there's a critical gating issue, we'd like to participate in the discussions.

I heard that some of the overlapping issues that may affect our client's interests may be discussed on Friday. We'd like to participate in that. Of course, Your Honor may decide that's unnecessary if the motion to intervene you don't find very persuasive. With that, I'd like to present our --

THE COURT: That's a bad way to start an argument.

MR. DAVIS: With that, I'd like to present our motion

to intervene, if it's okay with Your Honor.

THE COURT: Sure. Why don't you proceed with it.

MR. DAVIS: Okay. So just a little bit of background. The clients we represent are basically retail investors in Hong Kong primarily. There are approximately 30,000 people in the group we seek to represent. We currently represent only seven named individuals. We've heard a lot of talk about a number of structured creditor products that are at issue in some of these other cases, and Mr. Schaffer of BNY made a point to say they do not owe us, my clients, any responsibilities, fiduciary responsibilities, presumably because we didn't purchase notes directly from them.

And that goes to one of the important matters in this case, and that is, what are our interests relative to the notes that are at issue in the Perpetual matter? And in the Perpetual matter you basically have notes called Saphir notes. And the Saphir notes were issued under a multi-issuer obligation program. To put that into the context of what we might see in the United States, you basically have a shelf document. You have a shelf document that explains the basic terms of the program, includes some of the important terms of every single note that's issued off of that program, and then you have a series of separate issuances where specific pieces of debt are issued. In our case, the Saphir bonds that we have an interest in are held in an intermediary trust; it's a trust

run by HSBC.

Now, HSBC sold mini-bonds to our client; they're called Lehman mini-bonds, and they're issued by a separate issuer called Pacific Finance. The critical point from our perspective is that, under the terms of the trust documents, the supplemental trust deeds that constitute the terms of our notes that we own -- we have a security interest in the Saphir notes, and that schedule interest gives us a right to intervene under Rule 24.

And the reasons that we explain in our paper is, under Rule 24(a)(1), we have a right to intervene, a mandatory right to intervene where permitted by federal statute. And from our perspective, Bankruptcy Code 1109(b) is applicable here where there's a right to be heard in any adversary proceeding under Caldor. The response by LBSF is, well, that only applies to parties-in-interest. And they cite case law that says, well, to be a party-in-interest you have to be a creditor of the estate.

And our response to that, Your Honor, is, well, we are a creditor of the estate because we have a security interest in property they're claiming belongs to them. And under well-settled principles of what is a creditor defined in Comcoach, a case cited by LBSF, we believe that we are a creditor, because they're basically looking at one of the assets we have a clear property interest in, namely a security interest, and,

secondly, a beneficial interest, because the assets are held in trust for our benefit. And that alone gives us the right to intervene under 24(a)(1).

Secondly, we think we have a right to intervene under 24(a)(2). And I won't go through the timeliness element because that's not disputed; I'll let LBSF speak to that if they think we're untimely. The second point, we say we have an interest in this property that is protectable and allows us to intervene under Rule 24(a)(2). Specifically, in our papers we reference the fact that LBSF essentially concedes that at a minimum we have a security interest in these notes and at a minimum we have a beneficial interest in these notes given the fact that our clients are beneficiaries of the trust in which these notes are held.

The point about the financing of these notes, Your Honor, is each one of these Saphir notes has a specific par value, a face value. In the case of the documents -- the few documents we've been able to get from LBSF -- the par value of a Saphir bond that's held in trust by HSBC in which we have a security interest is identical to the par value of the note that we held legal and beneficial ownership interests in. So, essentially the value of whatever is in this Saphir note ultimately equates to whatever the value is in this mini-bond note that we hold, with one important exception which I'll address toward the end.

All of this basically means that if LBSF is accessible -- and basically, from our perspective, Judge, rewriting the terms of the contracts that they agreed to in Saphir, to reverse the waterfall or reverse the payment priority, and they're able to persuade the Court this is an ipso facto clause, despite the fact that it's not just the reversal of the priorities that's at issue but how the parties intended to calculate termination payments. And that's a really critical point that I haven't heard mentioned yet.

Specifically, under the terms of the notes, of the Saphir notes, what happens is, when LBSF has a credit default event, basically the way that you measure the value of what needs to be transferred to them versus what needs to be transferred to the Saphir noteholder -- and yes, it's held for us in trust -- is determined with respect to very specific provisions that say when it's an event of default that's their fault, that they caused -- one hundred percent of the value that's locked up in those notes needs to be paid first to noteholders -- I misspeak -- first to BNY Corporate Trustee Services; they get their fees.

But the real parties-in-interest, of course, are the people who invested in these bonds. And right after BNY, the people who get paid are us. But that's just payment priority, Judge. Termination payment determines what the quantum of that payment is. And that's in a separate provision, and I haven't

heard anybody speak to that yet.

We think that's a critical issue that we share with what's occurring in the Perpetual matter. Why? Well, this goes to how does this affect our interest from a practical perspective? From a practical perspective, returning to the first point I made, what we're looking at here, Judge, is essentially a shelf takedown program.

So the principal document that's the backbone for all of the Saphir documents is called a principal trust deed. And the terms in the Perpetual principal trust deed are substantially identical to the terms in our principal trust deed. Why? Because it was the same one over time that was amended from time to time from the people who did the transactions to suit whatever differences or whatever changes in law they wanted to make. What did not change, Your Honor, was the definition of noteholder priority. What did not change, from our perspective, was how you calculate termination payments under each one of those individual notes.

Now, LBSF, in their papers, make much of the fact that we've said in our pleadings, Your Honor, that all of these notes are virtually identical. And I concede to LBSF that we haven't seen every single one of these documents. In our pleadings we've made good-faith allegations that are based on our belief that every single one of these bonds contains the exact same provision.

And one might ask, well, how could you make that allegation? And we would respond by pointing to notices that have gone out from HSBC that attached notices from BNY that basically say the payments -- the termination payments on all of these bonds are being held up because of an issue in U.S. bankruptcy court by Lehman. What is that issue? All you've heard today, Judge, is, ipso facto, safe harbor. It's the identical issue that applies to us.

What differences do we have with the Perpetual matter? Perpetual matter, as we understand it, is a trustee, represents sophisticated investors. We represent people who are safety deposit investors. They go into their bank, their retail depositors, and they basically see advertisements, Your Honor, for synthetic CDOs, and it's not even just a synthetic CDO with all the people in this room trying to explain exactly what that means. On top of that, part of the product that they purchased involved a separate first-to-default swap basket. Basically all that is, Judge, is an insurance -- it's an insurance asset. I'll skip that part and focus on the Saphir note again since it's getting late in the day.

THE COURT: No, no, it's not that. I'm trying to understand. What you're describing is something that seems awfully remote from the nexus of this litigation. This is a litigation between counterparties, and you're not a counterparty. How are you affected by it?

MR. DAVIS: Well, we're directly affected, Your Honor, because --

THE COURT: Well, explain that. I mean, you're describing a class of retail customers of, I guess, some broker-dealers in Hong Kong that sold the so-called mini-bonds, and you're describing what even to sophisticated listeners is a fairly exotic product. I don't know how they ended up buying it or what the disclosures were, but that's in front of me at the moment.

MR. DAVIS: It's not, Your Honor, and I agree. What's in front of the Court, and the issues that we want to intervene on, are specifically noteholder priority, termination payments and whether there are other reasons for the event of default --

THE COURT: What would you --

MR. DAVIS: -- of LBSF.

THE COURT: What would you say or do that wouldn't be said or done by other parties of the litigation?

MR. DAVIS: Well, essentially, Your Honor, our clients bought these notes under different circumstances, and the Court said that's not before Your Honor and I'll move on from that.

Separately, however, our understanding is that our notes were triggered -- the termination payments, if you will, under our notes were triggered at different times; it's not the exact time, Your Honor. And there are some provisions -- we can't say, obviously because we haven't seen every single one

of the documents, but there are some provisions that may have been triggered before the debtor filed for bankruptcy.

For example, one of the events of default of the swap counterparty, LBSF, is if the parent company ceases to meet its obligations to essentially guarantee the transactions. And the question that we have is whether the downgrading of LBHI's credit rating triggered a termination payment pre-petition. Post-petition, what's going to be different is the timing of these notices.

And the timing is absolutely critical. Why? Because payments also are critical. So if payments were due, Your Honor, before termination notices were sent out, and the failure to make those payments caused an event of default under our bonds, that would be different from what would be before the Court with respect to the other bonds, and it could very well affect whether ipso facto would apply at all.

And so what we don't want to have happen, Your Honor, is have an ipso facto argument, you know, black and white, plain-vanilla BNY arguing the case on behalf of the overwhelming majority of beneficial owners in these assets and we don't get the opportunity to be heard on whether there are other reasons why the bonds defaulted, other reasons why there was an event of default.

Separately, what LBSF would say, and it is to some degree -- is true, is that our clients didn't acquire the exact

Saphir bonds that are at issue in Perpetual. But the problem, Your Honor, and the reason why as a practical matter the Court's decision is going to affect our client's interests, is because LBSF has threatened to sue for damages if BNY doesn't respect the automatic stay allegation that it's alleged.

So as a practical matter, what that means, Your Honor, is our bonds can't be redeemed, haven't been redeemed, aren't making interest payments, my clients don't have their principal, my clients don't have their interest payments. And we believe that as a practical matter their interests are going to be affected by whatever the Court says. Every single dollar that goes to LBSF, at a minimum, a percentage of that dollar will not go to our clients.

And to the Court's specific question that this is a matter between counterparties, what I would say is we have a specific security interest in the Saphir bonds that collateralize our mini-bonds. We have a specific beneficial interest in the bonds that collateralize our mini-bonds. And we believe, under bankruptcy provisions and Comcoach that LBSF cites in their papers, and under Ohio v. Kovacs which basically says if you have a claim against property that the debtor claims it has an interest in, you're a creditor. And we think for that reason we should have the right to intervene, both under 24(a)(1) and 24(a)(2).

The last point I think I haven't covered already, Your

Honor, is we don't think BNY is an adequate rep. We don't have anything bad to say about them, except for the fact that it's not their money that's at risk. And secondly, they also, merely as a consequence of contracts and obligations they entered into with the debtors before petition, they also are fiduciaries to senior bondholders in this litigation, share that with Citibank to the extent, I think, 138 billion dollars, and underneath that have sole fiduciary obligations to sub-debt and junior debt to the tune of 17 billion dollars.

I think the principal focus for BNY is to avoid inconsistent judgments and essentially avoid reaching resolve where they are forced to pay out the corpus of the funds supporting the Saphir notes and risk a determination that they paid it out wrongly at some future date. That's one of the reasons why we think we're not adequately represented by BNY.

The last reason, Your Honor, is because we read their papers and their motion to dismiss, and we understand that there's a question of whether a necessary party needs to be joined here. And they basically say look, it's true, we're not the real stakeholders here. And counsel will say, well, look, you're one step removed from this program. And always in response to that we say, well, we have a security interest, it's in the terms of the documents governing our notes. It's a question of law as to whether we have a protectable property right in those notes when LBSF points at those documents and

says hey, Court, we want you to interpret and read the terms of these provisions in our favor, and essentially write out one of the most critical provisions in these documents.

I'll tie it up quickly, Your Honor, because I know that there's a lot remaining on the Court's schedule. But I also just would like to say that, under permissive intervention 24(a)(2), we think we do share a common question of law in fact. It's a difficult balance that the courts go through when they say, on the one hand, you have to have a common question of law in fact, but it's not -- as the Court asked, what additional questions would you raise and bring in this matter. We don't think, as LBSF suggests, that we would radically alter the nature of the questions before the Court.

Ultimately, it's one hundred percent within the Court's discretion to determine what pleading goes on file on behalf of our clients if we were permitted to intervene. If their claims are too broad or should be dealt with in another forum, we're open to obviously obeying the Court's orders on that and open to talking to LBSF about that.

The last point I would make, Your Honor, is our client's interest in this covers eighty percent of the bonds that were issued under the Dante program. To put that into perspective, the 70 million dollars that LBSF says they're in the money in because ipso facto applies is 3.5 percent of the value of the notes that were issued. Our clients have security

interests, contract rights to 80 percent, 1.5 billion dollars of notes that were issued under this program.

I think, from a practical perspective, Judge, it makes sense under 24(a)(2) to permit us to intervene if for no other reason than to have finality over this issue. There are competing interests here. The creditors' committee certainly would want, I would assume, a resolution in their favor, in all of the creditors' favor, which would be to our detriment, naturally. We, of course, would like a resolution that's in our favor that goes to our client's benefit, and we'd like it sooner rather than later. We allege in our pleadings, and we have good-faith basis for believing that the overwhelming majority of our clients are retirees. That doesn't mean the bonds are not governed by the terms of the bonds. So the process by which they acquired the bonds, none of that needs to be part of this.

And I guess, as a last point, certainty and speed, I think, would be of great benefit both to our clients and ultimately to the estate, and we certainly will attempt to enforce our client's rights elsewhere. We thought it was appropriate and right to bring these claims in Your Honor's court because it's so intimately connected to the bankruptcy estate. And with that, unless the Court has any additional questions, I turn over the podium to LBSF.

THE COURT: Okay. Thank you.

MR. RALPH MILLER: Your Honor, for the record, Ralph Miller again. The Wong plaintiffs don't meet any of the tests for mandatory intervention, and they shouldn't be allowed to intervene as a matter of discretion because they have virtually no connection with this adversary proceeding.

I know the hour is late. I want to make two points quickly. First, I want to try to clarify confusion about the facts, and I think the best way to do that is with some diagrams. And then I want to talk about --

THE COURT: You may approach with that.

MR. RALPH MILLER: -- controlling Second Circuit authority which explains why this relationship, which is frankly best described as a creditor of a creditor of a debtor, does not create the necessary nexus to bring these parties in.

We have copies of these. May I approach, Your Honor, and take out our larger copy so I can point to that?

THE COURT: Sure.

(Pause)

MR. RALPH MILLER: Your Honor, we passed up two copies of these; these were included in our responsive papers. I think the one to start with is the simpler one which represents the adversary proceeding that we are now having a hearing on and in which the Wong plaintiffs tried to intervene.

This is the Perpetual -- what's sometimes called the Perpetual Trust case. And as the Court can see -- and this, by

the way, I think, is essentially undisputed in this case -- we do have documents that have been filed in the Wong case that I can cite to the Court that explain the more complicated diagram. Perpetual Trustee was the sole noteholder. It bought notes that are not notes that had anything directly to do with the Wong plaintiffs. It bought notes called the 2006-5 and 2004-11 notes, and money from that was put into Saphir Finance PLC.

There is a swap with LBSF. This is the swap in which there is a question of ipso facto and whether the subordination of the swap counterparty, LBSF, which was otherwise in the money and but for its bankruptcy would have great value, whether that is a valid provision or it's invalidated by the ipso facto clause. In turn, that money was used to purchase some notes that were issued by other entities, and that's collateral that is held. The Wong plaintiffs have no interest in that collateral either. They're completely separated from this transaction.

The second diagram shows where the Wong plaintiffs actually are.

Can you get the other diagram?

And the best way to do that, I think, Your Honor --

(Pause)

MR. RALPH MILLER: This is just to explain. The Wong plaintiffs bought what they call retail notes, and those are on

the top of this picture, Your Honor. Those were sold in Hong Kong. Those notes, Your Honor, have nothing directly to do with Saphir. They were bought from an entity called Pacific Finance. The Pacific Finance principal trustee is -- well, it's in the record, and there is a swap involving LBSF. It does not contain this subordination or waterfall issue because, it simply says, that doesn't apply.

So I want to make it clear that this first swap does not contain the ipso facto issue that we've been talking about. The trustee there is HSBC. That was the point that Mr. Fleck made earlier is that his client is not the trustee there. This document provides that only Pacific Finance can enforce rights of the trust and the trustee.

These parties are actually investors -- that's all they are -- in Pacific Finance. They bought investments, that we'll call notes, that they basically purchased those notes. That's who the Wong plaintiffs are. Pacific Finance has nothing to do with the present adversary proceeding. Pacific Finance bought different Saphir notes from the same entity, Saphir PLC, a different series issued at a different time. And the trustee related to those notes is BNY Corporate Trustee Services.

There is a swap there. This swap has some of the same characteristics legally as the swap that is involved in this adversary proceeding. It's a different swap; it's different

documents. They're not identical, but there is a possible precedential affect if we recognize that.

Then there are notes issued by a different entity. And this whole transaction is separated so there is no direct interest at all in any of the swaps or any of the notes. The point that is being made by the Wong plaintiffs, and I want to be candid with the Court about how -- we kept hearing the phrase "as a practical matter" -- I'll go back to the recording system, Your Honor. "As a practical matter", they said, they might be influenced. What he means, I believe, is if the Court finds that the ipso facto argument is good, as certainly LBSF believes it is, and if that becomes precedent, and if that is extended to different contracts that have similar provisions, then less money may be available in this transaction and ultimately flow down to them when they try to collect from another entity. And in other words, they are saying that they hope to get money from somebody who may not have the money left because they may have to pay it to LBSF first.

That's why I say that literally what we have is if you say that LBSF is the party here, that's what's at issue here. They are a creditor of Pacific Finance, which is a creditor of Saphir Finance, that is a debtor that may owe money to LBSF. And they're saying if Saphir Finance has to pay the money to LBSF, under precedents that are going to be set, not because it's going to be binding on them in this case, then Saphir may

not have enough money to pay the party it owes money to which would pay money that they say they ought to get down here. There is another issue of how this swap may interact that has nothing to do with the present case.

So there is actually a Second Circuit case that's strikingly on point here, Your Honor, and controlling, and I'm sure you're familiar with it. This came out of the Refco Chapter 11, Krys v. the Official Committee of Creditors, 505 F.3d 109 (2d Cir. 2007). It was dealing with a party-in-interest concept, as you may know, and it had to do with investors in a Cayman Islands investment company that had made a settlement with a debtor and had paid a lot of money in the settlement. The analogy here is if we win and this money flows over here and -- however, it would be much more direct; it would be as if they were investors in this entity. They are actually several levels removed.

And what the Second Circuit concluded, based on its Comcoach case and others, is that an investor in an entity that may owe money to a debtor is not a proper party for a bankruptcy proceeding and should not have rights in that case to object to the settlement. And I wanted to point out two quotes from that, and this is at page 118, I believe, of the reported decision.

The Second Circuit said, "We hold, therefore, that investors are not a 'party-in-interest' within the meaning of

Section 1109(b) of the Bankruptcy Code and affirm the District Court's holding that the bankruptcy court did not abuse its discretion by proving a settlement without ruling on the merits of the investor's objection, allowing them to intervene or affording them an opportunity for discovery."

And then, very significantly, a little later the Second Circuit said, "Bankruptcy court is a forum where creditors and debtors can settle their disputes with each other. Any internal dispute between a creditor and that creditor's investors belongs elsewhere." And Your Honor, that is essentially what we have here.

There is another point; I want to deal with the principal trust deed very quickly. As was described, the principal trust deed is a shelf document and it's essentially adopted with supplemental instruments. It's in the record and we'd ask the Court to take judicial notice of it. It's in the Wong adversary proceeding, which is adversary proceeding number 09-01120. It's attached to the declaration of Richard Slack, who's sitting here; it happens to be Exhibit A. And if you flip over to page 3 of Exhibit A, it has a reference to the Contracts (Rights of Third Parties) Act of 1999. And it says, "a person who is not a party to this principal trust deed has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement except and to the extent, if any, that this principal trust deed expressly

provides for such Act to apply to any of its terms."

And so, Your Honor, in essence, this is like a derivative shareholder action. The rights, if any, of the Wong plaintiffs to get something from Saphir have to be asserted by this entity. It would be like shareholders of a corporation trying to sue directly in the name of the corporation; they'd have to go through some sort of a derivative procedure. And they haven't done that.

And I'd also point out that they say that they represent these 30,000 people. This has a very large assumption in it, which is that a class action is certified on behalf of those people in their proceeding. But in any event, even if that happened, even if they had a class, that class would not be able to act for Pacific Finance, which has nothing to do with this case.

So Your Honor, for those reasons, we believe that there is neither a right to intervene and that they should not be allowed to intervene, and we think the addition of these parties to this case will add unnecessary complexity.

Now, they will have the right to assert their position in the Wong proceeding, which conveniently is the next one up on the docket, Your Honor, for a pretrial conference. And that's where we believe they should be. And for those reasons, Lehman Brothers Special Financing and LBHI respectfully request -- actually, Lehman Brothers Special Financing is the

only plaintiff here -- respectfully requests that the motion to intervene be denied.

I'd be happy to answer any questions, Your Honor.

THE COURT: No, it was a very clear presentation of a complex subject.

MR. RALPH MILLER: Thank you, Your Honor.

MR. DAVIS: Your Honor, if I may, a couple of points. First, on the chart I would just say this isn't evidence of course. This is a --

THE COURT: It's a demonstrative.

MR. DAVIS: -- it's a demonstrative, LBSF's.

THE COURT: This isn't an evidentiary hearing; it's just an argument.

MR. DAVIS: It's an interpretation of some of the documents that they think support their client's interest. I would just point the Court to this line right here which says purchase of collateral to support obligations to LBSF and the Nabon Series N (ph.) noteholders.

THE COURT: You should go to the microphone, though.

MR. DAVIS: Sorry. The special purpose vehicle, Pacific Finance, had one purpose, one purpose alone; that was to buy Saphir bonds and sell them to the mini-bond holders.

THE COURT: But the issue here is really how indirect, in relative terms, the interests of your client base seem to be relative to the Saphir/LBSF counterparty dispute, which is the

core of this litigation. I mentioned that, during your presentation even before we heard from Mr. Miller, this is really a litigation between counterparties. I understand that there may be some indirect potentially adverse financial consequence, but it's indirect, at least that's how I see it. Can you tell me how I'm missing the point on this?

MR. DAVIS: I wouldn't suggest for a minute that you're missing the point. It's obvious I haven't done a good job explaining.

THE COURT: No, you've done a fine job.

MR. DAVIS: Well, Mr. Miller --

THE COURT: You've made it clear that you represent a class of retail investors in a mini-bond structure that perhaps has a billion-five of moms-and-pops in Hong Kong and elsewhere offshore that bought into some investments they probably never should have bought into, but it's not my job to determine the suitability of investments. At this point, my job is to figure out whether or not your group is so situated that they actually have a meaningful interest to protect in this particular litigation, and I'm having a hard time seeing that.

MR. DAVIS: I understand, and I appreciate the opportunity to clarify. Number one, I would just say, to the extent there are any issues whatsoever of suitability, it doesn't need to be litigated. The Court controls whatever pleading that we put on file in this adversary proceeding.

The second point, and perhaps the most critical point I'd like to leave the Court with, is that the mini-bonds, the assets that our clients bought, fine, they weren't hedge funds; fine, they weren't AFLAC; but they own these bonds, Your Honor and they're governed by the terms of the supplemental trust deed, which hasn't been spoken to yet.

Mr. Miller spoke an English law opinion governing the rights of third parties and that helps make it look like we're even more distant. But, basically, the supplemental trust deed isn't a bond, and that supplemental trust deed says specifically that the noteholders' mini-bonds are secured by the Saphir bonds. That interest is sufficient to protect under 24(a)(2) from our perspective if for no other reason than by operation of 102(2) of the Bankruptcy Code which says, when you have a claim, a claim is broadly defined and a claim includes security interest under applicable precedent. And the reason that our interests have been involved here is because LBSF has come forward and said -- made a claim to our security interest.

So the point I would just like to make as strongly and as clearly as I can is that our bonds are constituted by the supplemental trust deed. And a reading of the supplemental trust deed specifically says that we have a security interest in these bonds, number one; and number two, we have recourse to these bonds; and number three, that the bonds do not limit the rights of the noteholders to take action in any court.

Now there's an interesting footnote that is cited in their papers.

THE COURT: May I stop you for one second?

MR. DAVIS: Yes, Your Honor.

THE COURT: When you say we have a security interest in the bonds, is that the individual holders of the mini-bonds issued at the retail level have such interests or is that Pacific Finance, in some representative capacity, has that interest and you claim through Pacific Finance?

MR. DAVIS: Well, the question that the Court posed is answered based on the reading of the documents. Reading of the documents, from our perspective, leads to the conclusion that Pacific Finance put all of its interest and whatever it owned into the trust of which we are the trust beneficiaries. And it signed a supplemental trust deed that does contain some complexity, because --

THE COURT: So your certificate -- I mean, to put this in a different form, you're certificate holders in an entity that in turn put assets into a trust which holds the asset that you claim an interest in indirectly. Do I have it correctly so far?

MR. DAVIS: I certainly would not dispute with -- that's not our position, Your Honor. Our position is --

THE COURT: I want to know your position --

MR. DAVIS: Yes.

THE COURT: -- because I'm trying to understand.

MR. DAVIS: The perspective --

THE COURT: I'm trying to understand. This also goes to some of the standing issues that are going to be considered, not today, in the motion to dismiss the HSBC matter as it relates to LBSF on a standing basis. So I'm familiar generally with these issues but I'm not trying to determine anything that relates to those issues today; simply trying to understand, for purposes of the position you're now asserting in an unrelated litigation in which you seek to participate in on behalf of this not yet certified class of holders of mini-bonds, how they claim an interest in the underlying counterparty dispute, which is what this present litigation is about with BNY.

MR. DAVIS: Yes, Your Honor, if I may. One point that Mr. Miller made is we're a creditor of a creditor of a creditor, and I think that Your Honor was speaking to that point. The other point that I would make in addition to that, though, is we're also trust beneficiaries, and the Saphir notes are held in trust for our benefit. And the last question the Court posed is what do those bonds in trust for you have to do with this perpetual dispute that you're trying to intervene in? And I would just direct the Court to Exhibit A of our reply which basically sets forth a side-by-side comparison of condition 44 which addresses the value of the termination payments that occur upon an event of default triggered by LBSF.

They're identical. There's a lot of similarity here.

THE COURT: Okay.

MR. MILLER: Might I have a --

THE COURT: Mr. Miller has indicated he will be very brief at this moment.

MR. RALPH MILLER: I have, Your Honor. The one key point that I want to make is that they're not the same notes issued by Saphir regardless of what interest he might have in them. They're different numbered notes. If you'd just look on the diagrams, these are --

THE COURT: Same warning to you, Mr. Miller. As you move away from the microphone, the transcript becomes of questionable value --

MR. MILLER: If I may move this, Your Honor.

THE COURT: Sure.

MR. MILLER: -- so I can --

THE COURT: I don't really need to see it at all. I have a chart on my bench.

MR. MILLER: Well, Your Honor, as shown here, and this is only an illustrative transaction because there are seventy-nine tranches in the mini-bonds group that they talked about, these have certain numbers attached to these notes, like Saphir 2004-1, excluding 2008-6 notes, and if you look over on the ones that are involved in the present adversary proceeding, they're 2006-5 and 2004-11. They're not the same notes;

they're different notes. So the idea that they have some kind of security interest, they can't get security interest. This would be like saying that an accountholder in Bank of America with one account has a security interest in some other account, holder's account, because we're going to talk about what the accountholders' agreement means in a lawsuit.

It's certainly true that an outcome of some kind on how accountholder agreements work might have some effect on all the accountholders, but that doesn't mean that one accountholder has an interest in a different account. And so the security interest thing is really, I think, a confusion.

Thank you, Your Honor.

THE COURT: I'm satisfied, based upon what I've heard, recognizing that none of this is evidence but simply legal argument, that the Wong plaintiffs, in their capacity as holders of mini-bonds with an indirect interest in the legal determination to be made as between LBSF and BNY as trustee, have failed to demonstrate a sufficient connection to this dispute to warrant intervention under Rule 24 of the Federal Rules.

I find that the position asserted is sympathetic in the sense that we're dealing with a class of investors that bought into a vehicle that provided them with little obvious control, but this isn't the mechanism to gain that control. This is a complex dispute, as it is, and as I understand the

pleadings. At least to this point, it's a dispute that is almost purely legal in nature and, at least from the perspective of LBSF, has been presented as a matter that can be decided by the Court as a matter of law in a motion for summary judgment.

To the extent that that is true, this is not a situation in which the credibility of witnesses or the passionate arguments of counsel should make that much of a difference. This is a dispute in which the Court, exercising hopefully some intelligence, and after careful deliberation, will be exercising judgment as to the proper significance of certain Bankruptcy Code provisions in the context of a particular transaction. For that reason, I have some question as to whether, even if we weren't dealing with a creditor of a creditor of a creditor, that this is a case in which intervention would be appropriate. This is not the bankruptcy case itself; this is an adversary proceeding. It's an adversary proceeding between the debtor, LBSF and its counterparty. The creditors' committee has been granted leave to intervene just today, given the special status of the committee as a party that represents the interest of all creditors generally.

I'll entertain an appropriate order denying the motion to intervene brought on behalf of the Wong plaintiffs.

MR. RALPH MILLER: Your Honor, if we may, we will

submit that order shortly. Thank you.

THE COURT: That's fine.

(Pause)

MR. SLACK: Your Honor, the next adversary proceeding is in fact the Wong adversary proceeding. And we have both a pretrial conference on today and also the motion to stay discovery which Your Honor alluded to earlier.

Your Honor, I apologize but it's Richard Slack from Weil Gotshal for the debtor.

THE COURT: You don't have to apologize for being Mr. Slack.

MR. SLACK: Thank you.

THE COURT: Nothing you can do about that.

MR. SLACK: So what I would suggest, Your Honor, is, I think from the standpoint of a pretrial conference, we actually have a schedule in place. We have -- that's for the motions to dismiss that are pending; those are scheduled to be heard, actually, on fairly short order in September. So that's just a couple of months away.

And I would like to move to our motion, Your Honor, which is to stay discovery pending the determination by the Court of those motions to dismiss.

THE COURT: Okay. I'd like to say, and it's not just because it's late but because I've actually spent some time thinking about the Wong case, that before people start talking

this is what bankruptcy judges in California sometimes refer to as a tentative ruling, I'm going to give -- in effect I'm going to shift the burden.

I believe that a stay of discovery is appropriate in this case based upon my review of the dispositive motions that have been filed, but I do not mean to suggest that I have come to any conclusion, whatsoever, as to whether the dispositive motion should be granted. I think that they raised some very strong arguments and, on the basis of those arguments, consider that the taking of what could turn out to be quite burdensome discovery, pending hearings that could resolve the case, would be a waste of resources.

And because of the time involved in getting from today to the hearing on the motion to dismiss is relatively short, and because I've seen that HSBC has filed its own motions to dismiss, two of them I might add, one that was filed as recently as, I think, yesterday, which have been listed for hearing on September 23rd, if I remember correctly, that the delay between today and the end of September is relatively inconsequential in the life of complex commercial litigation, whereas the burden associated with taking discovery pending that dispositive motion is immediate and irreversible.

So, under the circumstances, I'm inclined to grant the motion to stay discovery even before you say the first word. But I'd like to turn it over to counsel for the Wong plaintiffs

to convince me otherwise. This doesn't mean that I'm absolutely certain; it just means that that's where I'm clearly heading.

MR. SLACK: Okay. Your Honor, I've had the pleasure of practicing in California Bankruptcy Court and I'm going to sit down.

THE COURT: Very smart.

MR. MANDELKAR: Good afternoon, Your Honor. Ray Mandelkar from Coughlin Stoia for the plaintiffs. Please excuse my sniffles; I have a bit of a sinus infection.

With regard to the motion to stay, I understand the Court's position that it doesn't think discovery should go forward or the Court is inclined to grant the motion. However, I'm sensitive to the Court's comments about the burden and the volume of the briefing, so I don't intend to insist to be heard about it if the Court's really made up its mind.

We're pursuing discovery because we think it's the right thing to do for our clients, but we understand if the Court doesn't want to go there because the motion to dismiss is coming up soon. We understand that.

I think -- I couldn't hear quite well back there but I think the Court said it was not interested in hearing the standing arguments in detail today. I think that's what the Court said.

THE COURT: I don't want to hear the standing

arguments at all today.

MR. MANDELKAR: Okay.

THE COURT: What I was saying was that I recognize that the motion to stay discovery was notionally connected to the motion to dismiss and that standing argument. I was not making a determination with respect to that. I wasn't expecting to hear argument on the merits as to that.

But I obviously have given at least some attention to those arguments in order to recognize that they are what appear to be strong arguments. That doesn't necessarily mean they're winning arguments. And because I think that they are strong arguments, it makes good sense to stay discovery for the reasons that I said earlier in my comments before you stood to take the podium.

MR. MANDELKAR: Okay, Your Honor. Well, where I was going with that is, like I heard, the Court didn't seem to want to hear a lot about standing today, so I'm not going to talk about standing today.

THE COURT: That's fine. And you can have a complete reservation of rights to say everything you want to say about standing when we're actually hearing the motion to dismiss.

MR. MANDELKAR: Sure. I just want to make one comment real quick, Your Honor, is that we firmly believe that we do have standing. And I believe it was Mr. Miller who made a variety of comments in discussing the intervention motion,

which, I think the Court commented, would have some overlap with standing. And I just want to assure the Court that we have responses for all of those arguments and we're confident the Court will find that we do have standing when in fact it does rule on the motion to dismiss.

Thank you, Your Honor.

THE COURT: Fine. Are we now down to Olivia Bam?

MR. SLOANE: Your Honor, if I may just briefly be heard. I'm Howard G. Sloane from Cahill Gordon. We represent several of the HSBC entities as well as certain of the individuals, otherwise known as the foreign defendants in Wong.

THE COURT: Okay, in Wong, I just wanted to make clear --

MR. SLOANE: Yes.

THE COURT: -- for purposes of the record that, when you stood up after I said Olivia Bam, that you are talking about HSBC and Wong.

MR. SLOANE: I did that, Judge. I've been sitting on a hard bench and now it's a soft chair, so I was a little slow in getting up.

But in any event, I just wanted to clarify one thing, Your Honor, and comment on one point you made early. You asked early on whether it would make sense for there to be some coordination/discussion with the Court, particularly in the U.K. We think that's a good idea actually. There's been a

fair amount of discussion here about what went on in the U.K.; we're not a party to that proceeding. But I think for -- it makes good practical sense, and it is in accordance with practice, that a phone call would be appropriate. We'd be happy to provide you with the name of the judge in the U.K. to coordinate with, at least to know what is going to happen in July on that.

THE COURT: It's an interesting proposal, and given some of the history in this case I think, unless there is an established protocol for court-to-court communication, I'm concerned that it might be viewed as overstepping the bounds of reasonable diplomacy for me to reach out to the judge who's handling this in the High Court. It's a particularly sensitive subject in the context of the Lehman bankruptcy case generally because of certain issues that have arisen, mentioned during this morning's hearing, about the relationship that exists between the U.K. administrators and other parties-in-interest in global Lehman bankruptcy cases relating to the multinational protocol which has been subscribed to by a variety of trustees and foreign representatives and administrators but not by the U.K. administrators. And I recognize this is a separate and distinct litigation, but I think it would be, at least in my view, unduly sensitive for me to reach out to a justice of the High Court without knowing that it will be a welcome initiative.

MR. SLOANE: Fair enough, Your Honor. One other point I just wanted to clarify, you mentioned two motions by HSBC. The first motion that was filed was filed only because the time to file it as to the one HSBC defendant that had been served, it needed to be filed at that time. The other HSBC "entities" -- which we can argue about later whether they are, in fact -- had not been served at that point -- so we filed a timely motion pursuant to a stipulation reached with all counsel about the scheduling and counsel.

Weil Gotshal, is absolutely right: We have a schedule; it's going to be on September 23rd, as Your Honor knows. So that's why there are two motions.

THE COURT: Okay. Thank you for that.

(Pause)

THE COURT: If parties who are not involved in or interested in the Olivia Bam vs. Barclays matter wish to depart, you're free to do so. Let's take about a two-minute pause.

MR. LUCAS: Okay.

(Pause)

THE COURT: It's been a long day, hasn't it?

MR. LUCAS: Yes, it has Your Honor, but instructive. Your Honor, if we could just have a schedule, we might be able to keep the core people in the courtroom.

THE COURT: Is it possible to move more people out of

the courtroom; is that what you're suggesting?

MR. LUCAS: That's what I'm trying to do.

THE COURT: Okay.

MR. LUCAS: Your Honor, we realize -- this is John Lucas, Weil Gotshal, Your Honor. We realize that it's been a very long day, and prior to today's hearing we had contacted chambers and requested a chambers conference on some specific matters with the committee and the debtors.

THE COURT: We're not going to do that today.

MR. LUCAS: That's what we want to know, Your Honor. Thank you very much.

THE COURT: We're not going to do that unless we finish the argument in Bam v. Barclays in the next fifteen minutes.

MR. ROGERS: For the defendant/movant, I've got about five minutes, Your Honor. But of course I don't know about the plaintiff.

MR. LICUL: Your Honor, for the plaintiff, I think we have about the same.

MR. ROGERS: So it's conceivable.

THE COURT: How long is this conference likely to be?

UNIDENTIFIED SPEAKER: Fifteen minutes, Your Honor.

MS. HENRY: But whatever Your Honor would like.

THE COURT: Now, how many people are involved in this conference, and --

MS. HENRY: The debtors and the committee.

THE COURT: We'll do it just because people have been waiting for purposes of having the conference. However, note that I'll probably need some coffee before going into the conference.

MR. ROGERS: Your Honor, Theodore Rogers from Sullivan and Cromwell for Defendant Barclays Capital Inc., which is moving to dismiss this adversary proceeding. This is a proceeding brought by a former Lehman employee who is seeking to have Barclays pay a guarantee that Lehman made to her in its contract of employment with her last March.

THE COURT: I'm going to stop you right now because there's something that has been bothering me about both this case and the Coreth matter.

MR. ROGERS: Yes, Your Honor.

THE COURT: And I'm not suggesting that it does anything to affect your motion to dismiss or what we're going to be talking about today. But between the time of oral argument in connection with the Coreth matter and the scheduling of oral argument in this matter, a hearing was held, I believe, on June 24 and special counsel for LBHI, Jones Day, sought and obtained the right to pursue certain 2004 discovery from Barclays having to do with, among other subjects, Barclays conduct in respect of employees and the assumption of employee liabilities and the payment of those liabilities pursuant to

the asset purchase agreement.

It is unclear to me to what extent any of the discovery that may be currently underway relating to that general topic may have any impact, whatsoever, with respect to either the Coreth matter or this matter. And so even before you argue this, I want you to know that I am probably not going to decide it right away.

MR. ROGERS: All right.

THE COURT: In fact, I have stopped working on the decision that relates to Coreth -- I'm letting you know that because, as I recall, you argued that --

MR. ROGERS: Yes indeed, Your Honor.

THE COURT: -- in part, because I am concerned about what, if anything, may come out of that discovery that impacts my deliberations as to the treatment of employees. Now, I recognize that there are a whole host of particular legal arguments that you have raised as it relates to the assumption of particular employment agreements and that the investigation that's being conducted may be much more general in nature and not go to the question of individual agreements. But I'm nonetheless concerned about being asked to decide in a vacuum matters that may later become a subject of public interest in the bankruptcy case itself. So now you have it. That's my point.

MR. ROGERS: I understand, Your Honor.

THE COURT: My point is, feel free to argue it, recognizing that I'm not going to decide this so quickly.

MR. ROGERS: Okay. Understood, Your Honor. The reason we're making the motion to dismiss though, of course, is because we believe that, similar to other motions to dismiss, there is no basis as a matter of law for these claims, accepting the allegations as true, except for contrary documentary evidence.

So our position would be that legally whatever goes on in other discovery about other employees and other situations or even other claims, that the claims made in this complaint are legally meritless.

And I will go quite quickly, Your Honor, in light of what we said earlier. A very brief review of the facts with respect to Ms. Bam. As Your Honor noted, the Coreth case is quite similar. The amounts at issue are much larger in Coreth at 19.6 million dollars was the amount of that guarantee, payable in Lehman stock as well as cash.

Here, Ms. Bam, in March 2008, signed a contract of employment with Lehman Brothers to become a vice president in its fixed income sales area. Her contract provided for a bonus payable in 2009 for her work in 2008 worth 185,000 dollars in stock and cash. Then, of course, the bankruptcy came and the purchase agreement between Barclays and Lehman dated September 16 was entered into.

The relevant provisions, from our point of view, are section 2.4(d) where Barclays excluded liability for Lehman employment contracts or equity claims, referring only to, then, 9.1(b) which is the general provision where Barclays agreed with Lehman that it would make severance payments and benefits available to those who Barclays took on and fired before the end of the year; no less favorable than Lehman's severance plans or agreements. And, again, that was part of the two-party agreement -- actually three; I mean the two Lehman entities and Barclays.

And then most significantly, we believe, for this motion, 13.9 of the purchase agreement provided that there would be no rights for third parties to claim benefits under that contract, the negating provision. And as we've noted before, this provision had particular application here given the extremely short time period that the two parties, the parties on either side, had to enter into this agreement. They didn't have time to consider the possibility of third-party claims or the like.

After that agreement, Ms. Bam was offered at-will employment by Barclays pursuant to an e-mail, which is written, and it's an exhibit to the motion papers. The only payment term Barclays offered her was salary, and she was offered employment pursuant to Barclays' policies. So there was no mention of the Lehman bonus, no undertaking of the Lehman

bonus.

In November 2008, Barclays terminated Ms. Bam. As the complain recites, Barclays offered her severance of approximately 50,000 dollars, which she turned down, and we are here. If Barclays had waited until 2009, it would not have had any obligation under the purchase agreement to offer her any severance; because it let her go, it offered the 50,000 dollars.

There are three sources of claims in the complaint here, and, Your Honor, we submit that as a matter of law they cannot go forward. One source of claims is the purchase agreement itself between Barclays and Lehman. But the no-third-party beneficiary clause, the negating provision, we submit, is a matter of New York law which we briefed at great length here as well as in the Coreth provision, provides that Ms. Bam has no right to make a claim under that agreement.

The second source, potentially, is a claim under her contract with Lehman Brothers, and Ms. Bam claims that Barclays assumed that contract. But there was no motion under Section 365 of the Bankruptcy Code as required to assume Ms. Bam's contract. There's no mention of Ms. Bam's contract. The cases that plaintiff cites are cases where -- and we had this same colloquy in the Coreth proceeding and then some later letter briefing about this -- where in a bankruptcy setting there was express assumption, express reference to a contract which then

was -- there was a sale order and the contract was assumed. There's no reference whatsoever to Ms. Bam and no right for her, we submit, to try to charge Barclays with liability under her contract with Lehman Brothers, which was not assumed.

The third source recited in the complaint is Barclays' employment arrangement with Ms. Bam herself. And as I noted earlier, Barclays' e-mail, written offer of at-will employment to her, similar to that made to other Lehman employees, was simply that at-will employment, fixed salary, no other guarantees of any bonus or provision for them, and that she would be an employee pursuant to Barclays' policies and under established New York law; among others, International Paper v. Saween (ph.). There's no claim as a matter of law.

The last claim, I think it's almost an undisputed matter of labor law. There's a claim under the New York labor law that there would be no claim unless one had a contractual right to compensation that could rise to the level of a wage. Then one could argue that the labor law might require some payment of the wage. But I think it's undisputed, if there's no right to wage, then there's no claim under the labor law.

And I'll sit down, Your Honor, unless there are any questions, and reserve --

THE COURT: No, you're benefitted by the fact that I heard much the same argument in connection with Coreth. So I -- and it was at greater length in Coreth.

MR. ROGERS: All right.

MR. LICUL: Good afternoon, Your Honor. Valdi Licul, Vladeck Waldman Elias & Engelhard, for Ms. Bam. The question Your Honor posed at the onset was -- or questioned here is what impact the discovery may have that's been ordered in this case, not in this case but in the --

THE COURT: In the bankruptcy case.

MR. LICUL: -- bankruptcy case. And I think it's very important because it may define exactly what it is that Barclays agreed to pay as severance.

Barclays doesn't dispute that it owes Ms. Bam severance. The dispute here is about whether or not this 185,000 dollar payment is severance and that the discovery, which may show what it paid to other folks and what its practices were, may define exactly what severance is here. For example, in this case, which is similar to the Coreth case, Barclays offered Ms. Bam ten percent of her guaranteed minimum, which suggests that there was some acknowledgement there that they were, in fact, obligated to pay her severance. What they did with respect to other folks may also inform the Court's judgment and the party's judgment on this.

With respect to the 185,000 dollar payment, it's our position that it has all the hallmarks of a severance payment. It's not denominated as severance payment but it's not payment for work she has done because she left prior to the time it

would have been paid. It's not an inducement to stay longer because she had been fired. In fact, the agreement itself, the purchase agreement, doesn't define what severance is but it has all the hallmarks of severance. It is an amount to be paid by the employer to the employee upon the termination of employment through no fault of the employee.

Had Ms. Bam left, she would have forfeited her severance. Had she engaged in misconduct and been fired for cause, she also would have forfeited her severance. However, the reason this payment came into being, her vested right came as a result of being fired as a part of a reduction in force.

THE COURT: Let me break in and ask you something which certainly came up in the context of Coreth; and as far as I can tell, these cases are very similar in terms of the legal issues that are being presented on the Barclays motion to dismiss. The issue that was heavily vetted during oral argument in that separate adversary proceeding focused, as I recall, principally on the fact that the contract in question was not expressly assumed by Barclays under the sale transaction. And so the dilemma for someone who represents a plaintiff such as your client is that you have a sale order which purports to exclude all rights for third parties to claim third-party beneficiary rights and you have a scheduled list of contracts to be assumed by contract.

In the case of Coreth, because the damages associated

with the contract were so material, I was able to ask a whole bunch of questions about, well, how can you take the position that a 19.6 million dollar severance claim wasn't specifically identified to be assumed; and if it wasn't assumed, how can you take the position that it somehow picked up under the sale order. Your case is a little different in the sense that, while it's still quite a lot of money for Ms. Bam, I'm sure it's a significant sum; it's not a shocking sum.

What's your position on the issue of assumption and assignment of the contract? It wasn't assumed and assigned, so how can Barclays have liability under it?

MR. LICUL: I don't know, Your Honor. They were conceding that it wasn't assumed and assigned. I think the contract followed the same path as the Lehman severance plans or agreements. They are incorporated within that language. What the language of the purchase agreement says is that Barclays will pay, and Barclays doesn't dispute this, will make severance payments pursuant to Lehman's severance plans, not a single plan but plans, or other agreements covering such employees, which suggests individual employment agreements.

And I think in that context the Lehman severance plan gets in as an assumed liability, which Barclays does not dispute, as well as everything else. And I don't recall that there was any express motion to have the Lehman severance plan assumed -- assigned and assumed either. But there's no dispute

that Barclays actually has to pay under that plan. So I think it's part of the same category of assumption that was consummated at the time of the purchase agreement.

It would make no sense for Barclays to argue, and I think they do this a little bit in piecemeal, that just, sort of, trot out 365 in one context but ignore it in another context, to say yes, we owe severance. We didn't attach a severance plan, by the way, to the asset purchase agreement; it wasn't expressly the subject of a separate motion. But we admit that we owe that money but not perhaps severance provision in an individual employment agreement, which is what we're saying this is.

The language of Section 9.1(b), under which Barclays agreed to pay this amount, is very broad in terms of the rights it confers. It specifically starts off with a statement that says this is not intended to limit the rights of employees. And what it says is that Barclays will make payments no less favorable than what the transferred employee would receive under a Lehman severance plan or other agreement. That's extraordinarily broad language, and it certainly encompasses a severance provision in an individual employment agreement.

What Barclays' position does is it turns that language on its head. Rather than providing Ms. Bam with no less than she would have received had she been fired by Lehman, that's exactly what they are trying to do. If Ms. Bam had been fired

by Lehman Brothers as part of a reduction in force, I don't think there is any question she would have been entitled to the 185,000 dollar guarantee. She was fired without cause. She's entitled to that payment as severance. It wasn't an earned payment inasmuch as she didn't work through the end of January.

There's also the problem with 365, that what Barclays is trying to do here is slice up the employment relationship into its components. We will assume liability for severance. We will assume liability. We will take her on as an employee, we will pay her a salary and we will give her the same benefits she received. But we don't want to pay the 185,000 dollars. And one of the things that 365 does not permit is this sort of picking and choosing within the individual contract as to what Barclays, in this case, which is the purchaser, wants to accept and what it doesn't want to accept. It hired Ms. Bam, same salary, same position, and I think that it's then bound by the same terms that she had with Lehman.

An alternative argument here, Your Honor, is that there is a separate two-party agreement here between Barclays and Ms. Bam. She was given an offer of employment by e-mail; that employment offer does not contain all the material terms. The only way to define what those terms are is to go back and look at her offer with Lehman. It doesn't state what her salary would be. It doesn't even have her position. The only way that her engagement with Barclays, and prior with Lehman,

can be defined is by looking at both of these documents in tandem. It's part of the same transaction, her employment as a fixed-income salesperson.

And I will make one last point, which is, the at-will doctrine here is a red herring. All the at-will doctrine says is that an employer may fire an employee for good/bad reason or no reason at all. It says nothing about what they owe to the employee if they get fired. Ms. Bam was an at-will employee of Lehman. They could have fired her whenever they liked, but they contracted away their right not to pay her severance. And in this case they said the trigger here was if we're going to fire you without cause we will make this payment to you. And that is an obligation that Barclays assumed expressly, under the agreement, as a successor to Lehman in this transaction.

THE COURT: Okay. Thank you.

Do you want to comment?

MR. ROGERS: Yes. Just briefly, Your Honor. First of all, the Lehman severance plan actually distinguishes bonus guarantees from severance; it's Exhibit D to the moving papers. It says that you're not entitled to severance if you have a bonus guarantee. Barclays offered Bam a severance in accordance with Lehman's severance plan.

And, by the way, I know that Mr. Licul didn't do it intentionally, but the language was a little bit garbled. The language of Section 9 says "provides for payment of severance

payments and benefits no less than Lehman severance plans or agreements", not "no less than severance plans or other agreements". The language is Lehman Severance Plans, Lehman severance agreements will be done, will be paid. But a bonus guarantee, as the severance plan explicitly states, is a different animal than severance.

Severance is what was offered, and substantial severance was offered. And it was much more than the plan would have provided just for the timing piece. The severance plan provides that you get a certain amount of money, a certain number of weeks per year of service; plus the company can offer more if it wants. And Lehman -- the 50,000 dollars is way more than it needed to do for two months' service.

In terms of picking and choosing, Lehman -- the purchase agreement doesn't really assume the Lehman severance plan. It's an agreement by Barclays with Lehman to make that offer to these employees who it's going to fire before year-end.

And in terms of the argument that we can't pick and choose, I'm not quite sure what is meant there. Counsel acknowledges that under 365 there would have to be an assumption of the entire contract. Even under their theory, Barclays did not assume her Lehman contract. Barclays offered at-will Barclays employment at the same salary, no other money terms, and then, as an employee in accordance with Barclays'

plans, the at-will doctrine is directly applicable here.

As the cases we cite say, when you're an at-will employee, you're subject to your current employer's policies; you're free to leave, but you're subject to your current employer's policies. And Barclays' offer to her was come join us at Barclays, we'll pay you your salary, you're now our employee, we'll set what you're position is going to be, we may fire you but you don't have a Lehman bonus guarantee.

Thank you, Your Honor.

MR. LICUL: Your Honor, just thirty seconds. In terms of the Lehman severance plan, the Lehman severance plan actually, as it operates, offers the employee the greater of a calculation under a particular severance formula or the guarantee. So it actually incorporates the guarantee, or, rather, a guarantee is incorporated into the severance plan as it --

MR. ROGERS: Just say the language. And it is Exhibit D to the moving declaration: "Further, an employee is not eligible to receive such payments", meaning severance payments, "if the employee will receive further payments pursuant to a compensation agreement/compensation guarantee."

THE COURT: Okay.

MR. ROGERS: Thank you.

THE COURT: I'm going to follow through on my opening remark. No offense, but I'm going to sit on this for a little

bit.

MR. ROGERS: Understood, Your Honor.

THE COURT: And I'm also going to give the parties an opportunity, if they wish, to comment in a supplemental letter submission, and I'm going to just give you a time to do it only so that I know when the time has run that you're not doing it -- this isn't a strong suggestion that it be done; it's just that I'm interested in your perspectives on it -- between now and, say, two weeks from today at 5:05.

I'm interested in knowing what, if any, position the plaintiff takes and Barclays takes as to the applicability of the 2004 discovery, which is currently being conducted by special counsel for Lehman. If everybody agrees that it's completely irrelevant, I will expedite my decision and ignore whatever happens there. If everybody agrees that it's completely relevant, I'll wait. If there's a split, I'll wait, assuming that I'm persuaded by the party who says that I should wait, that I should wait. Okay?

IN UNISON: Thank you, Your Honor.

THE COURT: We're adjourned.

(Proceedings concluded at 5:06 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Ellen S. Kolman

Digitally signed by Ellen S. Kolman
DN: cn=Ellen S. Kolman, c=US
Reason: I am the author of this document
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Date: July 16, 2009